Supreme Court, U.S.
FILED

03 - 22 JUN 26 2003

No. OFFICE OF THE CLERK

In the

Supreme Court of the United States

YVONNE G. TROUT, individually and on behalf of others similarly situated and CLARA A. PERLIGIERO,

Petitioners,

v.

SECRETARY OF THE NAVY AND COMMANDING OFFICER, NAVAL COMMAND SYSTEMS SUPPORT ACTIVITY,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the D.C. Circuit

PETITION FOR A WRIT OF CERTIORARI

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EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

QUESTIONS PRESENTED

1. Whether the express waiver of sovereign immunity enacted by the Congress of the United States in Section 114(2) of the Civil Rights Act of 1991 permitted the District Court to award interest to compensate for delay in payment of back pay and attorney's fees in a successful sex discrimination class action, which was pending before the District Court on the merits and Final Judgment was ***not*** entered until two years after the effective date of Section 114(2)?

   A. Whether "ordinary principles" of statutory construction should be applied in analyzing the plain language of the waiver of sovereign immunity contained in Section 114(2), which the federal defendants concede is partial waiver of sovereign immunity applicable to the *Trout* case?

   B. Whether this Court's holdings in *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), and *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 839 (1990), require "prospective" application of Section 114(2) and allow award of pre-1991 interest?

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Petitioners, sixty-seven prevailing plaintiffs, respectfully petition for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this case on January 31, 2003. App. 1a-13a.[1] Petitioners timely filed a Petition for Rehearing and Suggestion for Rehearing *En Banc*, which were denied on March 28, 2003. App. 14a-15a.

OPINIONS BELOW

The opinion of the Court of Appeals, reversing the trial court's judgment, is reported at 317 F.3d 286 (D.C. Cir. 2003). The Orders of the Court of Appeals denying the Petition for Rehearing and Suggestion for Rehearing *En Banc* are not reported. App. 14a-15a.[1] The District Court's Memorandum Opinion and Orders granting plaintiff's motion for the award of interest on back pay and attorney's fees are not reported. App. 16a-23a.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

STATUTE AT ISSUE

The statute in issue is Section 114(2) of the Civil Rights Act of 1991, which amended Section 717(d) of the Equal Employment Opportunity Act of 1972. The 1991 Act amended Section 717(d) to read as follows:

> The provisions of section 2000e-5(f) through (k) of this title, as applicable, shall govern civil actions brought

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[1]References to the Appendix to this Petition are the page number followed by "a."

hereunder, ***and the same interest to compensate for delay in payment shall be available as in cases involving nonpublic parties.*** (Emphasis added.) 42 U.S.C. Section 2000e-16(d) (2002).

STATEMENT OF THE CASE

Petitioners prevailed in a class action lawsuit brought under Title VII of the Civil Rights Act of 1964 to vindicate their employment right to be free of gender discrimination when the District Court approved settlement of the claims of sixty-seven class members on November 23, 1993.

While this litigation was pending on the merits, the Civil Rights Act of 1991 ("the Act") became law. Congress included Section 114(2) in the Act in response to this Court's decision in *Library of Congress v. Shaw*, 478 U.S. 310, 318 (1986), which held that interest on attorneys' fees to compensate for delayed payment was not available against the United States absent an express waiver of sovereign immunity. Section 114 expressly provides the waiver that *Shaw* found lacking. *See* H.R.Rep No. 40. 102d Cong., 1st Sess., pt. 1 at 87 (1991).

1. Initial Proceedings

U.S. District Judge Harold H. Greene certified the plaintiff class and issued his first liability opinion on April 16, 1981, in which he found the undisputed disparity in salaries between similarly situated men and women violated Title VII. *Trout v. Hidalgo*, 517 F. Supp. 873, 878 (D. D.C. 1981). On October 20, 1981, Judge Greene entered an order providing for relief. *Trout v. Hidalgo*, 1981 WL 416. On March 10, 1982, Judge Greene denied the Navy's Motion for

Reconsideration of the 1981 relief order. *Trout v. Lehman*, 1982 WL 323.

On appeal, the U.S. Court of Appeals for the District of Columbia Circuit affirmed Judge Greene's finding of class-wide liability. *Trout v. Lehman*, 702 F.2d 1094, 1106 (D.C. Cir. 1983). This Court granted the Navy's Petition for *Certiorari*, and summarily vacated and remanded this case for "findings of fact, based on new evidence if necessary." *Lehman v. Trout*, 465 U.S. 1056 (1984). Mr. Justice Stevens, writing in dissent, prophetically stated:

> The Court's action today encourages the kind of litigating strategy that gives the party with the greater resources a significant advantage unrelated to the merits of the case. The kind of casual command to begin anew that is reflected in today's order tends to undermine the ability of trial judges to exercise firm control over the progress of litigation. *Id.* at 1061 (footnote omitted).

2. Proceedings on Remand

On remand, the District Court ***again*** found the Navy liable for sex discrimination. *Trout v. Lehman*, 652 F. Supp. 144 (D.D.C. 1986). On November 27, 1991, the Court entered an order directing the Navy to comply with his relief awards to sixty-seven class members. *Trout v. Garrett*, 780 F. Supp. 1396 (D.D.C. 1991). The District Court ordered an interim back pay award of $670,402.75 for the period June 1970 through April 30, 1979, to be made to each of these sixty-seven class members. *Id.* at 1412, n. 30. The Court also ruled that class members were entitled to additional back pay "for

the period 1979 through the present." *Trout v. O'Keefe*, 144 F.R.D. 587, 597 (D.D.C. 1992).

On January 22, 1993, the Navy conceded to payment of additional back pay through December 31, 1991:

> [T]hat under the regression analysis approved by the Court in *Trout v. Garrett*, 780 F. Supp. 1396, 1411-1420 (D.D.C. 1991) and the Court's Order of November 12, 1992, and assuming the correctness of the underlying liability determination, and the validity of the method of computing relief, the plaintiffs would be entitled to additional back pay in the amount of $368,277.18.

Stipulation of January 22, 1993, R. 549.[2]

The December 31, 1991 date was chosen because the calculations prepared by plaintiffs' expert witness, Dr. Mahlon Straszheim, demonstrated there was continuing, statistically significant disparity based on gender between the salaries paid to men and those paid to women from 1970 through December 31, 1991.

On September 20, 1993, the parties presented a tentative settlement of all claims against the Navy to the District Court. Joint Stipulation of Settlement. R. 553. On November 22, 1993, the District Court held a "fairness hearing" and approved settlement of back pay through December 31, 1991. R. 569. Pursuant to the Joint Stipulation of Settlement, the parties explicitly reserved the issue of whether class members would be

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[2]"R" denotes the corresponding numbered entry in the District Court's civil docket.

entitled to a pre-November 21, 1991 award of interest on back pay and attorney's fees. R. 553.

At the time of the November 22, 1993, Rule 23 "fairness hearing" this Court was considering two cases interpreting the impact of the Civil Rights Act of 1991. After this Court's decision in the most pertinent case, *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), the federal defendants submitted a Notice to the Court, stating their position that: " Section 114's provision of interest on backpay and attorney's fees against the United States is not retroactive. Interest on the full amount of both backpay and attorney's fees begins to run as of the effective date of the Act, November 21, 1991." Notice to the Court, R. 586. App. 22a-23a. The Navy thus conceded that there was an express waiver of sovereign immunity in Section 114 of the Civil Rights Act of 1991 and that Section 114 applied to the *Trout* litigation.[3]

In orders issued on July 22, 1998 and August 12, 1998, the District Court, guided by this Court's decision in *Landgraf* and the D.C. Circuit's decision in *Brown v. Secretary of the Army*, 78 F.3d 645, *reh'g denied*, 86 F.3d 225 (D.C. Cir.), *cert. denied*, 519 U.S. 1040 (1996), ordered that defendants pay plaintiffs' prejudgment interest on back pay and attorney's fees for the period prior to the passage of the 1991 Act. App. 16a-21a. The equities, U.S. District Judge Harold H. Greene observed, supported the award of interest because of delays caused by the Navy's litigation strategy. The District Court stated: "On November 22, 1993, the court approved a stipulation of settlement in this protracted

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[3]The Navy also acknowledged that Section 113 of the 1991 Act, which governs compensation of expert witnesses, applied to the *Trout* litigation for services rendered prior to November 21, 1991. Notice to the Court, R. 586. App. 22a-23a.

Title VII litigation. It took twenty years to reach the point of settlement because the defendant insisted on opposing, appealing and moving to re-open already-litigated issues at every turn." App. 16a.

Distinguishing the principal case on which the Navy relied, Judge Greene wrote:

> Limited to its facts, the rule of Brown applies only to cases in which the merits of the underlying action were completed prior to November 21, 1991. Because the instant case was very much alive and being actively litigated on that date, *Brown* is not dispositive and plaintiffs are entitled to prejudgment interest on attorney fees.

App. 17a-18a (footnote omitted). Judge Green observed that: "This case is the classic paradigm where prejudgment interest is appropriate; a Jarndyceian case that has taken on a life of its own and, more importantly, been a constant presence in the lives of the plaintiffs and on the docket of this Court." App. 19a (footnote omitted).

On May 31, 2001, District Judge Paul L. Friedman also ruled that prejudgment interest should be calculated at the prime rate. App 24a, 28a. On July 17, 2001, Judge Friedman entered Final Judgment awarding $8,627,276.50 in interest on back pay and $1,477,020.90 in interest on attorneys' fees. App. 30a.

3. The D.C. Circuit's Analysis of Section 114(2)

In reversing the District Court and interpreting the express Congressional waiver of sovereign immunity contained in Section 114(2), the D.C. Circuit relied heavily on its prior decision in *Brown*, even though the

facts in *Brown* and the issues raised on appeal were different from in Trout.[4] "Because the holding in *Brown* rested on considerations of sovereign immunity as enhanced by the rule of no interest against the sovereign, it is dispositive." App. 2a.

Brown also reaffirmed a long established body of D.C. Circuit law, including *Thompson v. Sawyer*, 678 F.2d 257 (D.C. Cir. 1982); *McKenzie v. Sawyer*, 684 F.2d 62, 78 (D.C. Cir. 1982); and *Stoller v. Marsh*, 682 F.2d 971, 974 (D.C. Cir. 1982), which held that the express waiver of sovereign immunity in Section 717 of the Equal Employment Opportunity Act must be applied to prohibited government conduct occurring prior to the March 1972 effective date of the statute, where an administrative complaint or lawsuit had been filed prior to that date. *Brown*, *supra*, at 652.

In analyzing Petitioners' claims, the D.C. Circuit employed a "rule of strict construction, enhanced by the no-interest rule." *Id.* at 290, App. 7a. Citing this Court's decisions in *Shaw* and *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 685 (1983), the Court of Appeals asserted that: "Statutes waiving the sovereign immunity of the United States are subject to the rule of strict construction." *Id.* at 289. App. 6a. The Court continued:

> "As such, waivers of sovereign immunity are to be read 'no more broadly than

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[4]As the *Brown* panel observed "litigation on the merits of Brown's claim was ***completed*** and the attorney's fee incurred before the statute became effective." *Id.* at 654 (emphasis added). Mr. Brown obtained a final District Court Judgment in 1989 and this judgment was affirmed on the merits by the Court of Appeals in 1990. The Petitioner in *Brown* sought retroactive application of Section 114(2) because he had no statutory right to prejudgment interest at the time judgement was entered in his favor. *Id.* at 647.

> [their] terms require,' *id.* at 290, *citing Brown*, 78 F.3d at 649, App. 6a. The Court ruled that "any doubts about the scope of a waiver [are to] be resolved in favor of the narrower governmental liability."

Id. App. 7a (citation omitted).

The Court of Appeals observed:

> "These principles of sovereign immunity understandably take on 'an added gloss of strictness' when applied to claims of interest against the United States because the historical 'no-interest rule' bars recovery of interest against the government 'unless the award of interest was affirmatively and separately contemplated by Congress.'"

Id. at 290, *citing Shaw*, *supra*, at 315, 318-19. App. 7a.

The Court held that:

> "Adopting the rules of strict construction central to *Shaw* and *Ruckelshaus*," "the rule of strict construction displaces the *Bradley* analysis [that a court is to apply the law in effect at the time of its decision] when the question is whether a waiver of sovereign immunity is to be applied retroactively."

Id. citing *Brown*, *supra*, at 654. App. 9a.

The purpose of the rule of strict construction, coupled with the no-interest rule and informed by

Landgraf, is to "protect the United States Treasury from potentially excessive liabilities which Congress did not anticipate." *Id.*, *citing* *Brown*, at 650 (internal quotations omitted). App. at 11a.

The Court of Appeals concluded: "*Brown* was informed by the Supreme Court's holding in *Landgraf*, which declined to give retroactive effect, absent congressional intent, to provisions of the 1991 amendments that would attach new "monetary liability . . . to *conduct* occurring before the statute's enactment." *Landgraf*, *supra*, at 284 (emphasis added).[5] The Court of Appeals never expressly analyzed the language of Section 114(2).

The Court of Appeals applied a completed conduct test, rather than looking to the date of the entry of judgment. App. 8a. The court held: "It is of no relevance whether the liability phase or the merits phase of the litigation was pending when Section 114(2) became effective." App. 11a. The D.C. Circuit concluded this Court's decisions in *INS v. St. Cyr*, 533 U.S. 289 (2001), and *Martin v. Hadix*, 527 U.S. 343 (1999) "remove[d] any doubt that the conduct underlying the complaint, rather than the procedural posture of the litigation, has significance in this context." App. 10a.

REASONS FOR GRANTING THE WRIT

The Congress of the United States enacted the express waiver of sovereign immunity contained in Section 114(2) of the Civil Rights Act of 1991 to waive sovereign immunity of the United States, as required by this Court's decision in *Shaw*, *supra*. This Petition raises the fundamental question of whether this

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[5] The D.C. Circuit's quotation of the passage from *Landgraf* eliminated the words "of a private party." *Id.* at 284.

acknowledged and express waiver of sovereign immunity permits the District Court to award interest for delay in payment of back pay and attorney's fees in a successful class action for sex discrimination, which was pending on the merits on November 21, 1991, and where Final Judgment on the merits was not entered until two years after the effective date of Section 114(2). Petitioners urge that the answer is "yes."

The questions presented are important because the Court of Appeals decision below is an unauthorized, judicial narrowing of an express waiver of sovereign immunity enacted into law by the Congress of the United States. The Court of Appeals rule of construction undermines the separation of powers allocated to coequal branches of the government and infringes on the power of Congress to waive the sovereign immunity of the United States. The rule of construction adopted by the D.C. Circuit creates a result which is contrary to the clearly expressed intent of Congress in enacting a waiver of sovereign immunity allowing for the award of interest against the United States.

This Court should grant *certiorari* to decide the fundamental question of how Congressional waivers of sovereign immunity are to be construed. If Respondents were "nonpublic parties," Petitioners would be entitled to prejudgment interest. The Congressional intent to fully compensate the victims of discrimination is clear. Under the ordinary rules of statutory construction, the plain meaning of the statute governs. Instead of applying the "normal rules"of statutory construction, *Lindh v. Murphy*, 521 U.S. 320, 326 (1997), in analyzing the plain language of the acknowledged waiver of sovereign immunity contained in Section 114(2), the Court of Appeals applied its "special rule" of strict construction of waivers of sovereign immunity

enhanced by the "no-interest rule" first articulated in *Brown* in analyzing the waiver of sovereign immunity.

The D.C. Circuit noted the differences in approaches taken by other courts of appeal. The D.C. Circuit stated the conflict in these terms: "Despite the Supreme Court's reaffirmation in *Ruckleshaus* [*v. Sierra Club*, 463 U.S. 680 (1983)] and in *Shaw* that waivers of sovereign immunity must be construed narrowly, there remains considerable confusion about the relationship between that ***special rule*** and the principles governing the retroactivity of statutes in general." *Brown*, *supra*, at 654 (emphasis added) (citations omitted).

There is no basis for this "special rule" of strict construction where the federal defendant concedes Section114(2) is at least a partial waiver of the sovereign immunity of the United States. App. 22a-23a. The D.C. Circuit's construction of the waiver of sovereign immunity raises serious issues regarding the separation of powers because there is no basis in Section 114(2) or in the rulings of this Court for the approach taken by the District of Columbia Circuit. Nor is there any support in the statute or in the decisions of this Court which would justify a finding of a partial waiver of sovereign immunity.

This Court's sovereign immunity jurisprudence dictates that interpretations of the scope of the waiver of sovereign immunity are governed by the ordinary tools of statutory construction. By creating its "special rule," the D.C. Circuit has created an unnecessary conflict between this Court's sovereign immunity decisions and its rules governing statutory interpretation. This issue is potentially raised each and every time Congress consents to suit by legislation. Review by this Court is necessary to resolve the conflict between these rules governing statutory interpretation of waivers of sovereign immunity and the split in the

District of Columbia, Fourth, Eighth and Tenth Circuits over the application of these rules.

This Court should provide guidance to the lower courts for the application of the acknowledged waiver of sovereign immunity of the United States contained in Section 114(2) of the Act is to be analyzed under principles articulated in *Bradley*, *Kaiser Aluminum*, and *Landgraf* or whether the D.C. Circuit's "special rule" for interpreting waivers of sovereign immunity applies.

Section 114(2) is clearly "prospective." The Court of Appeals misconstrued the distinction between the "retroactive" application of a statute and the "prospective" application of that statute. The Court of Appeals decision cannot be reconciled with this Court's holdings in *Landgraf* and *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 839 (1990), which require the "prospective" application of Section 114(2).

This Petition raises important questions regarding whether a change in statutory law applies to a specific set of circumstances or a case pending in the federal courts and what event "triggers" the application of the new law. This Court's decisions in *Landgraf* and *Kaiser Aluminum*, as interpreted by the Federal Court in *Travenol Laboratories, Inc. v. United States*, 118 F.3d 749, 751, 753, *reh'g denied* (Fed. Cir. 1997), hold that where the event triggering the application of the amended statute occurs after the passage of the amendment, the application of the statute is not "retroactive." Since the application of Section 114(2) to this case is not "retroactive," the District Court had the discretion to award pre-1991 interest for delay in payment of back pay and attorney's fees where the triggering event, the entry of Final Judgment, occurred two years after the effective date of Section 114(2).

In the last thirteen years, this Court has addressed the issue of whether a statute is "retroactive" or "prospective" and what events determine whether the application of a new statute is "retroactive" or "prospective." *E.g.*, *Kaiser Aluminum*, 494 U.S. 827, 839 (1990) (change in the post-judgment rate of interest); *Landgraf* (amendment to Civil Rights Act of 1964 allowing compensatory damages and jury trials inapplicable to cases where judgment had been entered on the date of passage); *Rivers v. Roadway Express, Inc.*, 511 U.S. 298 (1994) (amendment to 42 U.S.C. 1981 are not "retroactive"); *Hughes Aircraft Co. v. United States*, 520 U.S. 939 (1997) (Amendments to False Claims Act did not apply retroactively); *Lindh v. Murphy*, 521 U.S. at 335-337 (Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") does not apply to cases pending in federal court on effective date of the statute); *Martin v. Hadix*, 527 U.S. 343 (1999) (Prison Litigation Reform Act limited attorneys' fees for prejudgment monitoring services performed before Act's effective date, but did not limit fees for services performed before that date); and *St. Cyr*, 533 U.S. 289 (2001) (AEDPA and Illegal Immigration Reform and Immigrant Responsibility Act did not apply retroactively).

As Justice Scalia has observed: "It will remain difficult in many cases, to decide whether the presumption [of nonretroactivity] has been overcome by text and indeed to decide whether a particular application is retroactive." *Kaiser Aluminum*, *supra*, at 858 (footnote omitted) (Scalia, J. concurring). The Court should grant review because of the importance of the issue and because of the need to provide additional guidance to the courts of appeal.

Since Section 114(2) contains an express waiver of sovereign immunity, this provision should be

construed to achieve the statutory goals of Title VII and the Equal Employment Opportunity Act of 1972 of ending discrimination in employment by the federal government and providing full make-whole relief. *Kansas v. Colorado*, 533 U.S. 1, 10-11 (2001) (a monetary award does "not fully compensate for an injury unless it includes an interest component") (citations omitted); *Monessen Southwestern Ry. Co. v. Morgan*, 486 U.S. 330, 335 (1988) ("Prejudgment interest is normally designed to make the plaintiff whole and is part of the actual damages sought to be recovered.") (citations omitted).

I. CERTIORARI SHOULD BE GRANTED BECAUSE THE D.C. CIRCUIT FAILED TO GIVE EFFECT TO CONGRESSIONAL INTENT TO WAIVE THE GOVERNMENT'S IMMUNITY FROM INTEREST

Even though the federal defendant conceded, and the D.C. Circuit agreed, that Section 114(2) expressly waived the sovereign immunity of the United States, the D.C. Circuit failed to give full effect to Congressional intent to waive the government's immunity from interest. Instead of applying the "normal rules" of statutory construction that should be applied in analyzing the plain language of the acknowledged waiver of sovereign immunity contained in Section 114(2), the D.C. Circuit applied its own "special rule," first articulated in *Brown*, for interpreting statutes containing waivers of sovereign immunity.

This Court's "precedents make clear that the starting point for our analysis is the statutory text." *Desert Palace v. Costa*, — S. Ct. — 2003 WL 2130219 (2003), Slip op. at 6 (citation omitted). "And where, as here the words of the statute are unambiguous, the

'judicial inquiry is complete.'" *Id.* (citation omitted); *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 242 (1989) ("When the language of the statute is plain, the sole function of the courts is to enforce it according to its terms.") (citation omitted); *see Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 95 (1990) (once Congress has expressly waived sovereign immunity, a court should resort to ordinary principles of statutory construction and applying traditional rules of equitable tolling to statutory time limits for filing suit amounted to "little, if any, broadening of the congressional waiver" of sovereign immunity). The limitation on sovereign immunity created by the Court of Appeals does not appear in the statutory text and, unless the text of the statute is ambiguous, its language is controlling. *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). There is no ambiguity in the text which would support the conclusion that the language of Section 114(2) contains only a partial waiver of sovereign immunity.

The D.C Circuit erred because the plain meaning of the words "take effect upon enactment," Pub.L. No.102-166 Section 402(a), is that Section 114(2) applies to all judgments entered after the effective date of the 1991 Act because judgment is the point at which "expectations with respect to interest liability were fixed." *Kaiser Aluminum, supra*, at 839. Since interest cannot begin to run against the United States [or any party] until judgment is entered and the judgment at issue here was entered two years after enactment of the Civil Rights Act of 1991, the plain meaning of Section 114(2) allows the payment of pre-1991 prejudgment interest on judgments entered after the date of enactment.

This waiver of sovereign immunity is express and free from ambiguity. No expansion of the plain

language of the statute is necessary to apply the waiver to judgments entered after enactment. In short, the award of prejudgment interest on the judgments entered after the passage of the Act falls within the explicit waiver of sovereign immunity. *See Shaw*, *supra*, at 318 (waivers must be express, not implied, and cannot be premised on ambiguous statutory terms). Absent a clearly expressed legislative intent to the contrary, the statutory language must be regarded as conclusive. *Kaiser Aluminum*, *supra*, at 108 (citation omitted).

This language allows for only one construction, *i.e.*, Congress waived the sovereign immunity of the United States from paying prejudgment interest on judgments entered after November 21, 1991. *United States v. Nordic Village, Inc.*, 503 U.S. 30, 36 ("[A] statute must, if possible, be construed in such fashion that every word has operative effect."). Indeed, the statute reflects the clearly expressed Congressional intent that prevailing plaintiffs in Title VII cases against federal defendants would receive "the ***same*** interest to compensate for delay in payment as in cases involving nonpublic parties." 42 U.S.C. Section 2000e-16(d) (emphasis added).

Although "care must be taken not to 'enlarge' . . . a waiver of immunity beyond what a fair reading of the language of the section requires," *Ruckelshaus*, *supra*, at 686, neither should the courts ignore Congressional intent, as expressed in the plain language of Section 114(2). *Block v. Neal*, 460 U.S. 289, 298 (1983) ("The exemption of the sovereign from suit involves hardship enough where consent has been withheld. We are not to add to its rigor by refinement of construction where consent has been announced.") (Citations omitted).

Once a judgment has been entered that is covered by Section 114(2), then the "***same*** interest" may, within the discretion of the District Court, be paid

on judgments entered against federal defendants, as in private sector litigation. The plain language of the statute thus requires that post-1991 judgments carry prejudgment interest for the entire period of delay because this is the manner in which interest is awarded against private parties. *Loeffler v. Frank*, 486 U.S. 549, 557-558 (1988) (complete relief requires payment of interest). Thus, it is clear by the plain language of the statute that Congress intended that Section114(2) apply to allow Petitioners to receive the "***same*** interest" as in cases involving nonpublic parties, where judgment was entered after the passage of Act.

Indeed, Respondents concede that Section 114(2) applies to the *Trout* case, App. at 22a-23a, but claim that the waiver is only a partial waiver of sovereign immunity. There is no authority to support this novel "partial waiver" theory, which plainly defies the clearly expressed will of Congress. Just as "Title VII's provision making the United States liable 'the same as a private person' waives the Government's immunity from attorney's fees," *Shaw*, *supra*, at 319, so does a provision allowing payment of the "same interest to compensate for delay in payment shall be available as in cases involving nonpublic parties." Section 114(2).

The District of Columbia's rule of decision created in *Brown* and applied in *Trout* imposed "an added gloss of strictness" on the usual rules governing analysis of waivers of sovereign immunity. *Certiorari* should be granted because there is no basis for the "added gloss of strictness" or the "special rule" for analyzing express waivers of sovereign immunity under the rulings of this Court. The District of Columbia Circuit has usurped Congressional power, by a narrowing of the Congressionally enacted express waiver of sovereign immunity. *Bowen v. City of New York*, 476 U.S. 467, 479 (1986) (citations omitted)

(Courts should not "assume the authority to narrow the waiver that Congress intended" or "construe the waiver unduly restrictively."); *Franconia Associates v. United States*, 536 U.S. 129, 145 (2002) (rejecting government's statutory construction as inconsistent with "a realistic assessment of legislative intent") (citations omitted). The rule of strict construction applies only when there is ambiguity in the waiver of sovereign immunity. *See, e.g., Shaw, supra*, at 318; *Ruckelshaus v. Sierra Club, supra*, at 685.

The Court should grant the petition to resolve the split between the approach taken by the D.C. Circuit in *Brown* and *Trout* and the approach taken in the Fourth, Eighth, and Tenth Circuits as to the principles used to analyze statutes waiving sovereign immunity.[6] The District of Columbia Circuit's "special rule " is contrary to the approach taken by these other Circuits in analyzing the 1991 Act. The Fourth, Eighth and Tenth Circuits have addressed the applicability of the 1991 Act to the federal government and concluded that the question is "answered in part by reference to the principles of *Bradley* and *Landgraf*," *Brown, supra*, at 654. However, the District of Columbia Circuit concluded that "the rule of strict construction displaces the *Bradley* analysis when the question is whether the waiver of sovereign immunity is to be applied retroactively." *Id.*

There is also a split between the D.C. Circuit and the Federal Circuit's decision in *Travenol* on whether a waiver of sovereign immunity relating to the payment of interest should be analyzed under *Kaiser Aluminum-Landgraf* principles, or whether sovereign immunity

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[6]The *Brown* court cited *Woolf v. Bowles*, 57 F.3d 407, 410 (4th Cir. 1995); *Huey v. Sullivan*, 971 F.2d 1362, 1365-66 (8th Cir. 1992); and *Edwards v. Lujan*, 40 F.3d 1152, 1153-54 & n. 1 (10th Cir. 1994).

presents an additional hurdle to the payment of interest after the completion of the *Kaiser Aluminum-Landgraf* analysis. In *Travenol*, *supra*, the Federal Circuit ruled that the federal government was required to pay interest for periods prior to the passage of the Act without reference to any "special rule" of statutory construction adopted by the D.C. Circuit, where the event triggering the application of the new statute occurs after the effective date of the statute.

II. CERTIORARI SHOULD BE GRANTED IN LIGHT OF CONFUSION OVER STANDARDS FOR DECIDING WHETHER APPLICATION OF A STATUTE TO EVENTS NOT COMPLETED IS "PROSPECTIVE"

Congress passed Section 114(2) of the Civil Rights Act of 1991, which amended Section 717(d) of the Equal Employment Opportunity Act of 1972, to overturn this Court's decision in *Shaw* and to expressly waive the sovereign immunity of the federal government, thus allowing the award of prejudgment interest in Title VII cases brought against the federal government. *Brown*, *supra*, at 650. 42 U.S.C. Section 2000e-16(d); *see also* H.R. Rep No. 40, *supra*, at 87. What remains at issue is whether, pursuant to this Court's decision in *Kaiser Aluminum* and *Landgraf*, that waiver applies to cases pending on the merits on November 21, 1991, where judgment was not entered until two years later.

Petitioners seek the "prospective" application of the statute as this term was defined by this Court in *Kaiser Aluminum* and *Landgraf*. Thus, the D.C. Circuit erred in concluding the issue raised on appeal was the "retroactive" application of Section 114(2) of the Civil Rights Act of 1991. The opinion below conflicts with binding precedent of this Court on questions of

exceptional importance, *i.e.*, when is the application of a statute to a pending case "retroactive," rather than "prospective."

The D.C. Circuit erred because there is no genuine "retroactivity" issue as this term is defined in this Court's teachings. The D.C. Circuit's flawed analysis failed to correctly distinguish between "retroactive" application of a statute and "prospective" application. This Court's decisions in *Landgraf* and *Kaiser Aluminum* provide the rule of law applicable to this appeal.

In *Landgraf*, the Court sought to reconcile two seemingly conflicting retroactivity principles. The *Landgraf* Court specifically reaffirmed the continuing vitality of the holding in *Bradley*, "that a court is to apply the law in effect ***at the time it renders its decision***, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." *Id.* at 277, quoting *Bradley*, *supra*, at 711 (emphasis added). "When the intervening statute authorizes or affects the propriety of prospective relief, application of the new provision is not retroactive." *Id.* at 273. At the same time, the Court reaffirmed the principle that retroactivity is not favored in the law and the "congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result." *Id.*, quoting *Bowen*, *supra*, at 208. In resolving that tension, this Court states its unwillingness to give "retroactive effect to statutes burdening ***private rights*** unless Congress ha[s] made clear its intent." *Id.* at 270 (emphasis added) (citation omitted). In *Landgraf*, this Court held a different part of the Act, Section 102, did not "retroactively" apply to cases where judgment had been entered in a case involving private parties and was pending on appeal at the time of the enactment of

the statute. However, at this Court noted, different sections of the Civil Rights Act of 1991 require different analyses. *Landgraf, supra*, at 280 ("there is no special reason to think that all the diverse provisions of the [Civil Rights Act of 1991] must be treated uniformly for such purposes [of retroactive application]"). Thus an independent analysis is required to determine whether Section 114(2) applies to a case pending on the merits on the effective date of the Act.

A statute does not operate "retrospectively" simply because it applies to conduct antedating the statute's enactment. *Id.* at 269. Rather, the court "must ask whether the new provision attaches new legal consequences to events completed before its enactment." *Id.* "The conclusion that a particular rule operates 'retroactively' comes at the end of a process of judgment concerning the nature and extent of the change in the law and the degree of connection between the operation of the new rule and a relevant past event." *Id.* at 269-70 (footnote omitted). "When the intervening statute authorizes or affects the propriety of prospective relief, application of the new provision is ***not*** retroactive." *Id.* at 273 (emphasis added).

Under long-established case law, procedural rules may be applied in suits arising before their enactment without raising concerns about retroactivity. *Id.* at 274-75. "Application of a new jurisdictional rule usually takes away no substantive rights but simply changes the tribunal that is to hear the case." *Id.* at 274 (citation omitted). The allowance of prejudgment interest does not change Title VII's substantive law and the 1991 amendment simply allows the award of the ***"same"*** prejudgment interest to prevailing plaintiffs to compensate for delay.

"The mere fact that the new legislation requires reference to antecedent events or data, however, does

not make its application retroactive." *Landgraf, supra*, at 269. "A statute is not rendered retroactive merely because the facts or requisites upon which its subsequent action depends, or some of them, are drawn from a time antecedent to the enactment." *Reynolds v. United States*, 292 U.S. 443, 448-449 (1934) (application of the statute to acts occurring before the date of enactment had no "retroactive" effect). The test for determining whether a statute operates "retrospectively" or "retroactively" is not at issue where the conduct is not "completed" at the time the court renders a decision. *Landgraf, supra*, at 269-270. In *Landgraf*, the Supreme Court observed that: "A statute does not operate 'retrospectively' merely because it is applied in a case arising from conduct antedating the statute's enactment, or upsets expectations based in prior law." *Id.* at 269 (footnote omitted). "In determining whether a statute's terms would produce a retroactive effect, however, and in determining a statute's temporal reach generally, our normal rules of construction apply." *Lindh v. Murphy, supra*, at 326.

The court of appeals erred in concluding that the issue was one of "retroactive" application of Section114(2) because the Court failed to consider or analyze or even mention the teachings of *Kaiser Aluminum*.[7] Whether an application of law dealing with the award of interest is "prospective" or "retroactive" "depends upon what one considers to be the determinative event by which retroactivity or prospectivity is to be calculated." *Kaiser Aluminum, supra*, at 857 n. 3. (Scalia, J. concurring). A change in a statute is not "retroactive," but is a "prospective" application as long as the event that triggers the

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[7]Petitioners cited *Kaiser Aluminum* in the Brief filed in the Court of Appeals. Brief for Appellees at pp.19, 21, 27, 32, 33 and 38.

application of the law occurs after enactment. *Id.* Under *Kaiser Aluminum*, the triggering or determinative event for the purposes of determining eligibility for prejudgment interest is the entry of judgment. Judgment is the final reckoning which determines whether there is liability and defines the basis upon which interest is due. *Id.* at 839.

By its terms, Section114(2) is intended to compensate for delay in payment. In the present case, the judgment giving rise to delay in payment did not occur and therefore was not "completed" before the 1991 Act was enacted. There can be no prejudgment interest in the absence of a judgment and there was no determination that any back pay [and therefore any interest] was due prior to November 22, 1993. Only "on the date of judgment," *viz.*, November 22, 1993, were "expectations with respect to interest liability . . . fixed." *See Kaiser Aluminum*, *supra*, at 839 (refusing to apply amended post-judgment interest statute because right to interest became fixed at the date of entry of judgment).

Viewed from this perspective, the application of Section114(2) to a November 22, 1993 judgment does not present any true issue of "retroactivity" because the triggering event, the entry of judgment in *Trout*, did not occur until after the effective date of the 1991 Act. *Kaiser Aluminum*, *supra*, at 827 (interest rate for judgment determined on the date of judgment); *Travenol*, *supra*, at 751, 753 (payment of interest ***by the federal government*** on pre-act duties was a "prospective" application of the law where the triggering event occurred after the date of enactment and payment does not offend sovereign immunity).

The Court should also grant review of the first question presented because there is a split of the Circuits on what constitutes the triggering event which courts should use to determine whether the application

of a newly enacted statute is "prospective" or "retroactive." The analysis of the D.C. Circuit in *Trout* is directly contrary to that of the Federal Circuit. In *Travenol*, the Federal Circuit held that payment of interest ***by the federal government*** on sums deposited prior to the waiver of sovereign immunity was a "prospective" application of the law where the triggering event occurred after the date of enactment. Thus, pursuant to that reasoning, allowing payment of interest on funds deposited prior to the passage of the statute would be permitted. *Id. supra*, at 751, 753.

Contrary to the views of the Court of Appeals below, *St. Cyr* and *Martin* do not provide the rule of decision. Neither *St. Cyr* nor *Martin* are inconsistent with *Kaiser Aluminum*. *St. Cyr* simply follows *Martin v. Hadix* in applying the undisputed proposition that whether application of a statute is "retroactive" or "prospective" is determined by reference to the event that triggers the right in question.

Further, the decisions in *St. Cyr* and *Martin* are rooted in *Landgraf's* notions of fundamental fairness and the settled expectations of private parties. The presumption against statutory retroactivity has consistently been explained in terms of the unfairness of imposing new burdens on private persons after the fact. D.L. Bassett, "In the Wake of the *Schooner Peggy*: Deconstructing Legislative Retroactivity Analysis," 69 U.Cin.L.Rev. 453, 468, 474, 492, 510-511 (Winter, 2001) ("A consistent theme of fairness ties the Court's retroactivity decisions into a cogent whole.").

Considerations of fairness and concerns about settled expectations of private parties are not present here. Since the government is not a private party, the "principles of fairness that require notice and a right to be heard before subjecting private parties to retroactive liability does not obtain against the government."

Lockley v. Chao, 812 F. Supp. 246, 255 (D.D.C. 1993); *see Aledo-Garcia v. Puerto Rico Nat'l Guard Fund, Inc.*, 887 F.2d 354, 356 (1st Cir. 1989) ("[I]f the party against whom the statute is to be applied is a public party, then the 'struggle' against the so-called retroactive application is not as hard."); *City of Great Falls v. U.S. Dep't of Labor*, 673 F.2d 1065, 1068 (9th Cir. 1982) (fact that parties are public entities "favors the application of the new law").

By failing to follow *Landgraf* and *Kaiser Aluminum*, the court below erred in concluding that the triggering event was the Navy's discriminatory conduct, rather than the entry of judgment.[8] App. 8a. Since the entry of judgment was the triggering event, the application of Section 114(2) to the *Trout* litigation does not require a "retroactive" application of the statute, but a "prospective" application of that provision. Accordingly, the D.C. Circuit erred in concluding the award of interest required "retroactive" application of Section 114(2). Under *Kaiser Aluminum* and *Landgraf*, the Court of Appeals should have applied the law in effect at the time of the entry of judgment.

Moreover, there is a direct split in the Circuits between the approach of the D.C. Circuit and that taken by the Federal Circuit in *Travenol* on the payment of interest by the federal government. In *Travenol*, the law changed while customs duties were on deposit and the amended statute "became effective upon enactment." The federal government was required to pay interest on estimated duties deposited with the Customs Service prior to the waiver of sovereign immunity, even though

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[8] In the remedial state of a class action, "as to the individual members of the class, the liability phase of the litigation is not complete." *Price Waterhouse v. Hopkins*, 490 U.S. 228 266 (1989) (O'Connor, J., concurring).

the entitlement to such interest was not determined until after the Act became law. *Travenol*, *supra*, at 751, 753.

The Federal Circuit reached this conclusion based on the rules of statutory construction articulated in *Landgraf*, *supra*, and *Kaiser Aluminum*, *supra*, at 839, which define when a change in a statute operates retroactively and when the statute is "prospective." The Federal Circuit held that payment of such interest was not "retroactive" because the importer did not become entitled to the payment of any interest until after the statute had been amended to allow for the payment of interest.

Prior to the passage of that Act, the United States was not required to pay interest on customs deposits, just as the United States was not required to pay interest on back pay awards in Title VII cases under *Shaw*, *supra*. Although the original deposits of customs duties on which interest was sought were made before enactment, the recalculation of interest in *Travenol* occurred after the effective date of the statute requiring the payment of interest. *Travenol*, *supra*, at 751-52.

The Federal Circuit rejected the argument of the United States that requiring payment of interest beginning from the date of deposit would be impermissibly "retroactive" and that sovereign immunity prevented the payment of such interest. *Id.* at 752. The Federal Circuit held that the final calculation of the customs duties "is the triggering or operative event for determining whether or not application of section 1505(c) is retroactive." *Id.* at 753.

The change in the law relating to the award of interest against the federal government "***does not attach new legal consequences to any events that occur before liquidation because, being preliminary in nature, those events do not give***

rise to interest liability." *Id.* at 753, n. 5 (emphasis added).

The *Travenol* Court squarely rejected the government's strained interpretation of *Landgraf* and argument of a partial waiver of sovereign immunity:

> "It is not logical to state that interest begins to accrue on the date that estimated duties are deposited, because the principal amount *i.e.*, the amount of underpayment or overpayment is not known as of that date. . . . [O]nly once there has been a determination that an underpayment or overpayment existed can either party become entitled to receive interest."

Id. at 754.[9]

Because the "same interest" provision of the Civil Rights Act of 1991 logically applies to cases in which the merits had not been decided prior to enactment, the "prospective" application of the statute is necessary to pay the full amount of interest on ***post***-Act judgments in order to adhere to the congressional mandate contained in Section 114(2) of the 1991 Act.[10]

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[9]The *Travenol* court also relied on *McAndrews v. Fleet Bank of Mass., N.A.*, 989 F.2d 13, 16 (1st Cir.1993) ("a statute does not operate retroactively simply because its application requires some reference to antecedent facts").

[10]Since "the first issue is whether application of legislation to certain facts constitutes a retroactive application of that law," the *Travenol* court held that it was not required to "search for a clear expression of congressional intent to apply the law retroactively." *Id.* at 752, citing *Landgraf.*

Under the principles established in *Kaiser Aluminum* and *Landgraf*, the application of Section 114(2) of the Civil Rights Act of 1991 to the award of interest on judgments entered after the passage of the 1991 Act does not raise *bona fide* issues of retroactivity. Section 114(2) applies to cases brought prior to the passage of the 1991 Act where the triggering event, the entry of judgment, occurred after the passage of the 1991 Act. Section 114(2) applies to this case because Final Judgment on the merits was not entered until two years ***after*** the effective date of Section 114(2). Thus, the District Court had the authority to award interest for delay in payment of back pay and attorney's fees for the period prior to November 21, 1991, the effective date of the 1991 Act.

III. CERTIORARI SHOULD BE GRANTED TO RESOLVE THE CONFLICT BETWEEN THE D.C. CIRCUIT'S "SPECIAL RULE" AND TITLE VII'S GOAL OF PROVIDING FULL RELIEF TO VICTIMS OF UNLAWFUL DISCRIMINATION WHERE CONGRESS SPECIFICALLY WAIVED THE SOVEREIGN IMMUNITY OF THE UNITED STATES

Since Section 114(2) contains an express waiver of sovereign immunity, this provision should be construed to achieve the statutory goals of Title VII and the Equal Employment Opportunity Act of 1972 of ending discrimination in employment by the federal government and providing full relief. Since the victims of unlawful discrimination are required to be made whole under Title VII, and in the absence of the sovereign immunity defense, Petitioners should receive "the same interest to compensate for delay in payment . . . as in cases involving nonpublic parties." *Kansas v.*

Colorado, 121 S. Ct. 2023, 2029 (2001) (a monetary award does "not fully compensate for an injury unless it includes an interest component") (citations omitted); *Monessen Southwestern Ry. Co. v. Morgan*, 486 U.S. 330, 335 (1988) ("Prejudgment interest is normally designed to make the plaintiff whole and is part of the actual damages sought to be recovered.") (Citations omitted). Since Section 114(2) removes the sovereign immunity defense, the district court was authorized to award prejudgment interest to compensate for delayed payment as "an element of complete compensation." *Loeffler v. Frank*, *supra*, at 558 (citation omitted); *Berger v. Iron Workers Reinforced Rodmen, Local 201*, 170 F.3d 1111, 1140 (D.C. Cir. 1999) (awarding prejudgment interest for the entire period of the litigation as prejudgment interest must be an "ordinary part" of any award of back pay) (citation omitted); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418-422 (1975).

CONCLUSION

The Petition for a Writ of Certiorari should be granted to answer the fundamental question of whether a "special rule" of statutory analysis is required for statutes in which the federal government unambiguously waived its sovereign immunity, to resolve the split in the Circuits between the D.C. Circuit's "special rule" and the *Kaiser Aluminum-Landgraf* approach taken by the Fourth, Eighth and Tenth Circuits, and to resolve the split between the D.C. Circuit and that of the Federal Circuit in *Travenol*.

The Petition should also be granted to resolve a legal issue of importance regarding the identification of the triggering event which determines whether the application of a statute is "prospective" and to resolve the conflict between the D.C. Circuit's decision below and that of the Federal Circuit in *Travenol* to whether

the entry of Judgment is the triggering event for determining whether the application of a statute is "prospective."

The Petition should be granted to resolve the conflict between the District of Columbia Circuit's "special rule" of statutory construction and principles requiring the award of full, make-whole relief under Title VII.

Respectfully submitted,
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(Any footnotes trail the end of each document.)
No. 01-5325

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

YVONNE G. TROUT, ET AL.,
APPELLEES

v.

SECRETARY OF THE NAVY AND COMMANDING OFFICER, NAVAL COMMAND SYSTEMS SUPPORT ACTIVITY, APPELLANTS

December 6, 2002, Argued
January 31, 2003, Decided

COUNSEL: Daniel F. VanHorn, Assistant U.S. Attorney, argued the cause for appellants. With him on the briefs were Roscoe C. Howard, Jr., U.S. Attorney, and R. Craig Lawrence, Assistant U.S. Attorney.

Bradley G. McDonald argued the cause for appellees. With him on the brief were John F. Karl, Jr. and William P. Farley.

Bruce A. Fredrickson, Susan L. Brackshaw, and Jonathan C. Puth were on the brief for amicus curiae Metropolitan Washington Employment Lawyers Association in support of appellees.

JUDGES: Before: EDWARDS, ROGERS and GARLAND, Circuit Judges. Opinion for the Court filed by Circuit Judge ROGERS.

OPINIONBY: ROGERS

OPINION: ROGERS, Circuit Judge: In the most recent chapter of this extremely protracted litigation, the district court, invoking § 114(2) of the Civil Rights Act of 1991 ("Act"), Pub. L. No. 102-166, 105 Stat. 1071, 1079 (codified as an amendment to 42 U.S.C. § 2000e-16(d)), ordered the U.S. Navy to pay prejudgment interest on backpay and attorneys' fees for periods before November 21, 1991, to a class of women who successfully established that the Navy discriminated against them in employment on the basis of sex. Trout v. England, No. 73-55 (D.D.C. July 17, 2001); see also Trout v. Dalton, No. 73-55 (D.D.C. Aug. 12, 1998); Trout v. Dalton, No. 73-55 (D.D.C. July 22, 1998). The Navy appeals on the ground that § 114(2) cannot be applied retroactively to periods predating November 21, 1991, when § 114(2) became effective, citing Brown v. Sec'y of the Army, 316 U.S. App. D.C. 284, 78 F.3d 645 (D.C. Cir. 1996), cert. denied, 519 U.S. 1040, 136 L. Ed. 2d 533, 117 S. Ct. 607 (1997), as dispositive. Appellees would distinguish Brown on the ground that the Navy's liability was not finally determined until after § 114(2) became effective. Because the holding in Brown rested on considerations of sovereign immunity as enhanced by the rule of no-interest against the sovereign, it is dispositive, and accordingly we reverse the award of prejudgment interest to the Trout class for periods before November 21, 1991.

I.

In 1991, when Congress enacted § 114(2), the Trout class action was almost twenty years old. The litigation began in 1973 when Navy computer analyst Yvonne Trout and other female employees of the Navy's computer operations center sued the Navy for sex discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. The district court

consolidated the complaints and certified a class of civilian women employees who worked for the Navy's computer operations center at any time between June 6, 1972 and June 4, 1979. In 1981, after a lengthy trial involving forty-two witnesses, more than 7,000 pages of exhibits, and extensive regression analyses demonstrating sex discrimination in the Navy's hiring, promotion, evaluation, and assignment of women, the district court found the Navy liable for violating Title VII, Trout v. Hidalgo, 517 F. Supp. 873 (D.D.C. 1981), and granted relief to the Trout class in the form of backpay. Trout v. Hidalgo, 1981 U.S. Dist. LEXIS 17842, 1981 WL 416 (D.D.C. 1981). Following appeals by the Navy, Trout v. Lehman, 226 U.S. App. D.C. 357, 702 F.2d 1094 (D.C. Cir. 1983); vacated and remanded, Lehman v. Trout, 465 U.S. 1056, 79 L. Ed. 2d 732, 104 S. Ct. 1404 (1984), the district court reinstated its finding of discrimination in 1986 on remand. Trout v. Lehman, 652 F. Supp. 144 (D.D.C. 1986).

On August 5, 1988, the district court made an interim award of attorneys' fees and costs to the Trout class, in the amounts of $ 276,044.00 and $ 15,434.01, respectively. Trout v. Lehman, 702 F. Supp. 3, 4 (D.D.C. 1988). The Navy appealed the order to pay the interim attorneys' fees on grounds of sovereign immunity. Trout v. Garrett, 282 U.S. App. D.C. 33, 891 F.2d 332, 334 (D.C. Cir. 1989). This court, on December 15, 1989, denied the Navy's petition for mandamus and dismissed the appeal because the Navy conceded, and the court agreed, that 42 U.S.C. § 2000e-5(k) "waives the United States' immunity from claims, whether final or interim, for attorneys' fees as an element of costs." 891 F.2d at 336.

While the award of interim attorneys' fees was pending appeal, the district court, on October 12, 1988, ordered backpay relief for the Trout class dating back to 1970,

with individual hearings to be held before a special master to determine each claimant's entitlement. Trout v. Webb, 708 F. Supp. 358, 358-59 (D.D.C. 1988). After denying the Navy's motion for reconsideration, Trout v. Ball, 705 F. Supp. 705 (D.D.C. 1989), the district court referred the claims to a special master with instructions to determine which statistical methodology was most appropriate for determining backpay. 708 F. Supp. at 358. By memoranda and orders of March 30, 1990 and December 27, 1990, the special master accepted the statistical analysis for calculating backpay provided by the Trout class, and identified the members of the class entitled to relief. Trout v. Garrett, 1990 U.S. Dist. LEXIS 10060, 1990 WL 96640 (D.D.C. 1990); Trout v. Garrett, 1990 U.S. Dist. LEXIS 19222, 1990 WL 301806 (D.D.C. 1990).

Six days after § 114(2) became effective, the district court, on November 27, 1991, issued an order that (1) identified the class members entitled to backpay, (2) accepted the special master's findings that the Trout class' regression analysis should be used to determine the amount of backpay, and (3) awarded an interim backpay award of $ 670,402.75 for the period from June 1970 through April 30, 1979. Trout v. Garrett, 780 F. Supp. 1396 (D.D.C. 1991). Following this court's dismissal of the Navy's appeal of interim backpay for lack of jurisdiction, Trout v. Sec'y of the Navy, 971 F.2d 766 (D.C. Cir. 1992) (per curiam), the district court ruled, on November 12, 1992, that the Trout class was entitled to additional backpay because of the Navy's "indefatigable" and "inappropriate" delay tactics spanning twenty years of litigation, and expanded the backpay award to cover "1979 to the present," then November 12, 1992. Trout v. O'Keefe, 144 F.R.D. 587, 588 (D.D.C. 1992).

By stipulation of January 22, 1993, the parties agreed that the Trout class was entitled to additional backpay in the amount of $ 368,277.18 for the period from June 1, 1979 through December 31, 1991. In a settlement agreement of September 20, 1993, the parties agreed the eligible Trout class members were entitled to backpay through December 31, 1991, and attorneys fees through May 17, 1993; the Trout class reserved the right to seek interest on backpay and attorneys fees under § 114(2). The district court approved the settlement agreement on November 22, 1993. Regarding the reservation in the settlement agreement for interest, the Navy advised the district court that the government's position was that § 114(2) was not retroactive, and consequently, interest did not begin to run on backpay and attorneys' fees until November 21, 1991. By stipulation of May 10, 1995, the Navy agreed to pay interest on backpay and attorneys' fees awards beginning on November 21, 1991, again preserving the Trout class's right to seek interest for periods prior to November 21, 1991.

After this court issued its decision in Brown, 316 U.S. App. D.C. 284, 78 F.3d 645, holding that § 114(2) did not apply to a period before its effective date, the district court awarded the Trout class prejudgment interest back to 1970. Trout v. Dalton, No. 73-55 (D.D.C. Aug. 12, 1998); Trout v. Dalton, No. 73-55 (D.D.C. July 22, 1998). The district court, adopting the Trout class' argument, interpreted Brown to bar § 114(2) interest only where the merits of the litigation had been completed before § 114(2) became effective, and concluded that "because the instant case was very much alive and being actively litigated on [November 21, 1991], Brown is not dispositive and the [Trout class members] are entitled to prejudgment interest." While acknowledging that the "liability phase" had ended on April 25, 1990, the district court focused on the fact that the "award phase" was

ongoing when § 114(2) became effective. The court entered a final judgment for the Trout class on July 17, 2001, ordering the Navy to pay prejudgment interest, based on the prime rate, on backpay in the amount of $ 8,627,276.40, and interest on attorneys' fees in the amount of $ 1,477,020.90. Trout v. England, No. 73-55 (D.D.C. July 17, 2001).

II.

Section 114(2) provides Title VII plaintiffs in suits against the federal government with "the same interest to compensate for delay in payment [as is available] in cases against nonpublic parties." 42 U.S.C. § 2000e-16(d). Whether § 114(2) permits prejudgment interest for periods prior November 21, 1991, when it became effective, is a question of law that the court reviews de novo. Herbert v. Nat'l Academy of Sciences, 297 U.S. App. D.C. 406, 974 F.2d 192, 197 (D.C. Cir. 1992); Cuddy v. Carmen, 246 U.S. App. D.C. 25, 762 F.2d 119, 123 (D.C. Cir. 1985). However, this appeal turns on the proper interpretation of Brown, which, absent en banc review, binds the court on the question of law. See LaShawn A. v. Barry, 318 U.S. App. D.C. 380, 87 F.3d 1389, 1395 (D.C. Cir. 1996). We turn, then, to an examination of the analysis in Brown.

A.

Statutes waiving the sovereign immunity of the United States are subject to the rule of strict construction. Library of Congress v. Shaw, 478 U.S. 310, 318, 92 L. Ed. 2d 250, 106 S. Ct. 2957 (1986); Ruckelshaus v. Sierra Club, 463 U.S. 680, 685, 77 L. Ed. 2d 938, 103 S. Ct. 3274 (1983). As such, waivers of sovereign immunity are to be read "no more broadly than [their] terms require." Brown, 78 F.3d at 649. Further, as the court had

previously observed, "any doubts about the scope of a waiver [are to] be resolved in favor of the narrower governmental liability." Nichols v. Pierce, 239 U.S. App. D.C. 146, 740 F.2d 1249, 1257 (D.C. Cir. 1984); see also Shaw, 478 U.S. at 318; Ruckelshaus, 463 U.S. 680 at 685, 77 L. Ed. 2d 938, 103 S. Ct. 3274. These principles of sovereign immunity understandably take on "an added gloss of strictness" when applied to claims of interest against the United States because the historical "no-interest rule" bars recovery of interest against the government "unless the award of interest was affirmatively and separately contemplated by Congress." Shaw, 478 U.S. at 315, 318-19; see also Brown, 78 F.3d at 651; Thompson v. Kennickell, 254 U.S. App. D.C. 348, 797 F.2d 1015, 1017 (D.C. Cir. 1986).

In Brown, the court held that the rule of strict construction, enhanced by the no-interest rule, applies whether the court is examining a statute's substantive scope or its temporal reach. 78 F.3d at 650. The court's rationale was twofold. First, absent express direction from Congress that a statute is retroactive, to hold that a statute "waives sovereign immunity from an element of damages not contemplated by [ ] Congress" or applies to "a period of time not envisioned by Congress," risks "imposing upon the public fisc an unanticipated and potentially excessive liability." Brown, 78 F.3d at 650; see also Shaw, 478 U.S. at 316; Nichols, 740 F.2d at 1255. Second, the strict construction rule provides an important backdrop against which Congress acts when it waives sovereign immunity. Having indicated that this court "would take the legislature strictly at its word when it specifies whether and to what extent it waives sovereign immunity," the court in Brown concluded that it must presume that when Congress promulgates a waiver of sovereign immunity, it knows which principles will govern our interpretation of the waiver. Id.

Therefore, Brown examined the temporal reach of § 114(2) through the lens of strict construction, taking care not to extend the provision beyond Congress's intention. Finding no evidence in the text or the legislative history of the Civil Rights Act of 1991 that Congress intended its provisions to operate retroactively, 78 F.3d at 648, and noting that with the exception of two provisions of the Act that operate prospectively, the Act otherwise states that it is to "take effect upon enactment," § 402(a), Pub. L. No. 102-166, 105 Stat. 1071, 1099, the court held that § 114(2) was inapplicable where the government's liability was established and attorney's fees were incurred before § 114(2) became effective. 78 F.3d at 647, 654. The court explained that to apply § 114(2) retroactively would be to impose liability on the government without its explicit, required consent. 78 F.3d at 654.

B.

The only question, then, is whether the holding in Brown turns on the timing of the discriminatory conduct at issue, as the Navy contends, or on procedural posture of the case, as the district court concluded and the Trout class maintains on appeal. For the following reasons, we conclude that the district court misapplied Brown's retroactivity analysis by focusing on the procedural posture of the Trout litigation rather than the conduct underlying the litigation.

The last paragraph of the opinion in Brown states in relevant part:

Section 114(2) of the 1991 Act waives sovereign immunity with respect to interest on attorney's fees awarded under Title VII. In the case at hand, the litigation on the merits of Brown's claim was completed

and the attorney's fee incurred before the statute became effective. Therefore, to apply § 114(2) retroactively in this case would be to impose upon the United States a liability to which it has not explicitly consented.

78 F.3d at 654. Both the district court and the Trout class rely upon this paragraph as grounds for distinguishing the instant case in which the final judgment on the remedy was not entered until after § 114(2) became effective. See Trout v. Dalton, No. 73-55, slip op. at 2-3 (D.D.C. July 22, 1998); Appellee's Br. at 23. With the exception of the italicized language, however, nothing in Brown suggests that the availability of prejudgment interest turns on the procedural posture of the litigation. To the contrary, the court in Brown stated at the outset that the critical question was whether § 114(2) applies retroactively "to a case arising from conduct that occurred before it was enacted." 78 F.3d at 648 (emphasis added). The court thus understood its focus to be on the conduct underlying the complaint, not the status of the litigation itself. However confusing the reference to the status of the litigation in Brown be, it can only be understood as illustrating that there was no basis for an award of prejudgment interest under § 114(2); it cannot reasonably be read as altering the analysis on which the court relied in rejecting retroactive application of § 114(2).

This understanding of the last sentence of the opinion in Brown is also clear from the fact that the court in Brown explained its task as one of reconciling the principles applicable to waivers of sovereign immunity, articulated in Shaw and Ruckleshaus, with the principles applicable to retroactivity, articulated in Bradley v. Richmond School Bd., 416 U.S. 696, 40 L. Ed. 2d 476, 94 S. Ct. 2006 (1974), and Landgraf v. USI Film Prods., 511 U.S. 244,

128 L. Ed. 2d 229, 114 S. Ct. 1483 (1994). 73 F.3d at 648. Adopting the rules of strict construction central to Shaw and Ruckelshaus, the court stated that "the rule of strict construction displaces the Bradley analysis [that a court is to apply the law in effect at the time of its decision] when the question is whether a waiver of sovereign immunity is to be applied retroactively." 78 F.3d at 654. The court did not displace, however, "the traditional presumption," affirmed in Landgraf, "against applying statutes affecting substantive rights, liabilities, or duties to conduct arising before their enactment." 511 U.S. at 278 (emphasis added); see Brown, 78 F.3d at 649-52. To the contrary, Brown was informed by the Supreme Court's holding in Landgraf, which declined to give retroactive effect, absent congressional intent, to provisions of the 1991 amendments that would attach new "monetary liability ... to conduct occurring before the statute's enactment." 511 U.S. at 284 (emphasis added). The two-part rationale in Brown for employing the rule of strict construction mirrors the Court's language in Landgraf. Compare, e.g., Brown, 78 F.3d at 649-50, with Landgraf, 511 U.S. at 265-66. Moreover, Brown's conclusion that retroactive application of § 114(2) would "impose upon the United States a liability to which it had not explicitly consented," 78 F.3d at 654, was in keeping with Landgraf's instruction not to "impose[ ] new burdens on persons after the fact." 511 U.S. at 270.

The Supreme Court's decisions in INS v. St. Cyr, 533 U.S. 289, 150 L. Ed. 2d 347, 121 S. Ct. 2271 (2001), and Martin v. Hadix, 527 U.S. 343, 144 L. Ed. 2d 347, 119 S. Ct. 1998 (1999), remove any doubt that the conduct underlying the complaint, rather than the procedural posture of the litigation, has significance in this context. Both St. Cyr and Martin reiterate the view that "elementary considerations of fairness dictate that individuals should

have an opportunity to know what the law is and to conform their conduct accordingly ..." St. Cyr, 533 U.S. at 316 (citation omitted) (emphasis added); see also Martin, 527 U.S. at 360-361. Absent clear congressional intent, conduct "should be assessed under the law that existed when the conduct took place." St. Cyr, 533 U.S. at 316. It follows, as the statement in Brown illustrated, that § 114(2) does not apply to conduct that occurred before November 21, 1991. Here, the Navy's discriminatory conduct against the Trout class ended in 1979, before § 114(2) became effective. Trout v. Garrett, 780 F. Supp. 1396, 1400-01 (D.D.C. 1991). Consequently, prejudgment interest may not be awarded to the Trout class on backpay or attorneys' fees for periods prior to that date. It is of no relevance whether the liability phase or the merits phase of the litigation was pending when § 114(2) became effective. The purpose of the rule of strict construction, coupled with the no-interest rule and informed by Landgraf, is to "protect the United States Treasury from potentially excessive liabilities which Congress did not anticipate." Brown, 78 F.3d at 650 (internal quotations omitted).

The Trout class disputes that the Navy's discriminatory conduct ended in 1979, maintaining that "the Navy continued to discriminate against women through at least December 31, 1991." This position is based both on the district court's extension of the backpay award to prevailing class members through December 31, 1991, and what the Trout class views as the Navy's implicit agreement, by stipulating to those payments, that it was liable for conduct through that date. But the district court's extension of the backpay award was remedial in nature, intended only to compensate the Trout class for the Navy's delaying litigation tactics; the district court did not find that discrimination by the Navy against the Trout class extended past 1979. Nor did the Navy

implicitly agree that it was liable for discriminatory conduct through 1991; rather, the Navy stipulated only to the liability determined by the district court in 1986 on remand.

Finally, in Brown the court found no evidence of congressional intent to apply § 114(2) retroactively. [*18] 78 F.3d at 648. The Trout class' attempt to revisit this question comes too late, for it does not suggest that the court in Brown overlooked material legislative history. See generally Barry, 318 U.S. App. D.C. 380, 87 F.3d 1389. Not only does its claim of congressional intent to apply the 1991 amendments retroactively because the 1972 amendments to the Civil Rights Act applied retroactively ignore Brown and previous holdings of this court, it finds no explication in the language of the Civil Rights Act of 1991. The 1972 amendments, unlike the 1991 amendments, included "express congressional intent that [they were to] 'be applied to the fullest extent possible.' " Tomasello v. Rubin, 334 U.S. App. D.C. 375, 167 F.3d 612, 620 (D.C. Cir. 1999) (quoting McKenzie v. Sawyer, 221 U.S. App. D.C. 288, 684 F.2d 62, 78 (D.C. Cir. 1982)); see also Thompson v. Sawyer, 219 U.S. App. D.C. 393, 678 F.2d 257, 289 (D.C. Cir. 1989). Without language to indicate such an intent, the court has declined to give the 1991 amendments the same retroactive application as the 1972 amendments. Tomasello, 167 F.3d at 620.

Accordingly, in light of the court's analysis of § 114(2) in Brown and the Supreme Court's instruction that a "statement that a statute will become effective on a certain date does not suggest that it has any application to conduct that occurred at an earlier date," Landgraf, 511 U.S. at 257, we hold that the district court erred in awarding prejudgment interest under § 114(2) on backpay and attorneys' fees for periods prior to

November 21, 1991. Because the Navy has paid interim attorneys' fees to counsel for the Trout class that is attributable to litigation of the prejudgment interest dispute, and because the final amount of costs and fees remains to be determined, we remand the case to the district court for final determination of the costs and fees owed to the Trout class.

No. 01-5325

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Yvonne G. Trout, individually and on behalf of others similarly situated and Clara A. Perligiero,
Appellees,

v.

Secretary of the Navy and Commanding Officer Naval Command Systems Support Activity,
Appellants.

Filed March 28, 2003

BEFORE: Edwards, Rogers and Garland, Circuit Judges

ORDER

Upon consideration of appellees' petition for rehearing filed March 17, 2003, it is

ORDERED that the petition be denied.

Per Curiam

For the Court:
Mark J. Langer, Clerk

By:
Michael C. McGrail
Deputy Clerk

No. 01-5325

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Yvonne G. Trout, individually and on behalf of others similarly situated and Clara A. Perligiero,
Appellees,

v.

Secretary of the Navy and Commanding Officer Naval Command Systems Support Activity,
Appellants.

Filed March 28, 2003

BEFORE: Ginsburg, Chief Judge, and Edwards, Sentelle, Henderson, Randolph, Rogers, Tatel, and Garland, Circuit Judges

ORDER

Upon consideration of appellees' petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

For the Court:
Mark J. Langer, Clerk

By:
Michael C. McGrail
Deputy Clerk

Civil Action No. 73-55
(consolidated with 76-1206)
(HHG)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

YVONNE TROUT, CLARA PERLINGIERO, et al.,
Plaintiffs,

v.

JOHN H. DALTON, Secretary of the Navy, et al.,
Defendants.

Filed July 22, 1998

Memorandum and Order

This matter is before the Court on cross-motions for summary judgment on the issue of prejudgment interest on attorney fees. Resolution of these motions will mark the completion of one of the longest-running cases in this Court's memory. For the reasons that follow, plaintiffs' motion is granted.

I

On November 22, 1993, this Court approved a stipulation of settlement in this protracted Title VII litigation. It took twenty years to reach the point of settlement because the defendant insisted on opposing, appealing, and moving to re-open already-litigated and already-decided issues at every turn. See Trout v. Lehman, 702 F.2d 1094, 1106 (D.C. Cir. 1983); Trout v. O'Keefe, 144 FRD. 587, 588-90 (D.D.C. 1992); Trout v. Garrett, 780 F. Supp 1396, 1420-29 (D.D.C. 1991) ("[T]he government

has sought to prolong this litigation by every means possible, both fair and foul.").

On May 10, 1995, this Court stayed resolution of the final issue in this case, availability of prejudgment interest against the defendants, pending our Court of Appeals' decision in Brown v. Secretary of the Army, 78 F.3d 645 (D.C. Cir. 1996). Brown has since been decided and, almost twenty five years after this case began, this final issue is now ripe for decision.

II

Brown addressed whether Section 114(2) of the Civil Rights Act of 1991, which took effect on November 21, 1991, could be applied retroactively to cases pending when the section took effect. See 78 F.3d at 648. Section 114(2) waives the sovereign immunity of the United States for interest payments on amounts awarded in Title VII litigation. fn1 Brown, decided on March 12, 1996, held that section 114(2) is not retroactive and that sovereign immunity barred application of the new interest provision. See 78 F.3d at 647, 651.

III

The parties dispute whether Brown applies to this case. The plaintiffs contend that Brown applies only to cases like Brown, those in which the merits of the case were litigated and completed prior to November 21, 1991. The defendant argues that Brown applies to any case pending on the date of enactment.

Limited to its facts, the rule of Brown applies only to cases in which the merits of the underlying action were completed prior to November 21, 1991. Because the instant case was very much alive and being actively

litigated on that date, fn2 Brown is not dispositive and the plaintiffs are entitled to prejudgment interest on attorney fees.

A.

As of November 21, 1991, the effective date of the Act, the award phase of this case was being actively litigated. The following examples are representative of the tenor of this litigation after § 114(2) took effect.

Long after this Court concluded that the Navy had discriminated against the class on the basis of sex, on April 24, 1990 Navy counsel represented to the Court that it retroactively would promote five claimants. See Trout, 144 F.R.D. at 591. Then, on September 20, 1990 the Navy tiled a pleading entitled "Statement Regarding the Status of Backpay Claims for [the Five Claimants]" in which the department made a "fundamental change in position." See Trout, 144 F.R.D at 591-93. In that filing Navy counsel stated, contrary to the previous representations, that the promotions had not taken place and that the Navy would not. promote the five women until it had fully exhausted its claimed right to appeal the question of liability for discrimination of the entire class. See id at 591-92. This matter was not resolved fully until November 23, 1993, the date this Court entered the final Order approving the parties' Joint Stipulation of Settlement.

Additionally, as of November 12, 1992, almost one year after §114(2) took effect, this Court was still refereeing disputes over the backpay period and backpay amounts due to the claimants. These backpay issues also were not resolved until November 23, 1993.

As evidenced by the foregoing, although the Court had made a final determination of liability, the award phase was ongoing and the case still far from over when § 114(2) became effective on November 21, 1991.

IV

In addition to the above, the Court notes the purpose of prejudgment interest: to compensate a party for the delay in receiving payment. See Library of Congress v. Shaw 478 U.S. 310 (1986). This case is the classic paradigm where prejudgment interest is appropriate; a Jarndgceian case fn3 that has taken on a life of its own and, more importantly, been a constant presence in the lives of the plaintiffs and on the docket of this Court. Foremost in the Court's memory are the epic delays that prevented the efficient closure of an unfortunate chapter in the Navy's history. With this Order, that chapter hopefully shall close and the women who suffered discrimination by the Navy can finally put behind them this lengthy journey.

V.

Based on the lengthy delay endured by the plaintiffs in this case, the Court concludes that they are entitled to prejudgment interest. Additionally, as discussed above, § 114(2) applies to this case and the government is thus liable for the prejudgment interest awarded today.

Accordingly, it is this 22nd day of July, 1998 hereby

ORDERED that plaintiffs' motion for prejudgment interest on attorney fees is GRANTED; and it is further

ORDERED that within sixty (60) days of the date of this Order the plaintiffs shall submit to the Court a

calculation of the interest amount due using the prime rate.

HAROLD H. GREENE
U.S. District Court Judge

Footnotes

fn1 Section 114(2) provides that "the same interest to compensate for delay In payment shall be available; an in cases involving nonpublic parties." 42 U.S.C. § 2000e-16(d).

fn2 The Court recognizes that as of April 25, 1990 it had concluded that "the liability phase of the class action is final, and the class-litigation is no longer pending." Trout v. Garrett, Civ. A. No. 73-55, 1990 WL 96647 at * 2 (D.D.C. Apr. 25, 1990). As discussed below, however, the award phase of the litigation was ongoing and. was picking up steam when § 114(2) became effective. See e.g. Trout, 144 F.R.D. at 596-97.

fn3 See C. Dickens, Bleak House (1853).

Civil Action No. 73-55
(consolidated with 76-1206)
(HHG)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

YVONNE TROUT, CLARA PERLINGIERO, et al.,
Plaintiffs,

v.

JOHN H. DALTON, Secretary of the Navy, et al.,
Defendants.

Filed August 12, 1998

ORDER

For the reasons set forth in this Court's Memorandum and Order of July 22, 1998, it is this 11th day of August, 1998 hereby

ORDERED that the plaintiffs' motion for prejudgment interest on back pay awards is GRANTED; and it is further

ORDERED that within sixty (60) days of the date of this Order the plaintiffs shall submit to the Court a statement of the amount of interest due calculated using the prime rate.

HAROLD H. GREENE
United States District Judge

Civil Action No. 73-0055 HHG

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

YVONNE G. TROUT, et al.,
Plaintiffs,

v.

JOHN H. DALTON, Secretary of the Navy, et al.,
Defendants.

Filed June 8, 1994

NOTICE THE COURT

Defendants have agreed to make known by this date their position in this case regarding payment of expert fees, interest on backpay and interest on attorney's fees under the provisions of Sections 113 and 114 of the Civil Rights Act of 1991. Section 113 authorizes the payment of expert fees as part of the attorney's fees assessed against a private or public defendant in a civil rights action. Section 114 provides for the payment of interest by a federal defendant on the same basis that interest is available from a private defendant.

The position of the United States is as follows; fn1

1. Section 113's authorization for payment of expert fees as part of attorney's fees should be applied retroactively such that plaintiffs are entitled to payment of expert fees incurred before the effective date of the Act;

2. Section 114's provision of interest on backpay and attorney's fees against the United States is not retroactive;

4. Interest on the full amount of both backpay and attorney's fees begins to run as of the effective date of the Act, November 21, 1991.

The United States will brief these positions in full in its response to plaintiffs' pending motion on June 22, 1994.

Respectfully submitted,

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United States Attorney

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Footnotes

fn1 The position of the United States on these issues has been reached by the Department of Justice for all cases involving the federal government after full and careful deliberation.

Civil Action No. 73-0055 (PLF)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

YVONNE G. TROUT, et al.,
Plaintiffs,

v.

JOHN H. DALTON, SECRETARY OF THE NAVY, et al.
Defendants.

Filed May 31, 2001

MEMORANDUM OPINION AND ORDER

The issue before the Court in this matter is what interest rate should be applied to plaintiffs' award of prejudgment interest for back pay and attorneys' fees and costs. Plaintiffs contend that the prime rate of interest should be used to calculate their award of prejudgment interest. While defendants agree with plaintiffs' methodology for calculating the prejudgment interest in this case, they argue that the government Treasury Bill rate should be used. Upon consideration of the papers submitted by the parties and the entire record in this case, the Court concludes that the prime rate should be used to calculate plaintiffs' award of prejudgment interest.

I. BACKGROUND

Plaintiffs, employees of the Department of the Navy, filed suit in 1973 under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq., complaining of a pattern of discrimination in which women working in the Navy

were deprived of opportunities for career advancement. The facts of this case have been summarized in several opinions and need not be repeated here. See, e.g., Trout v. O'Keefe, 144 F.R.D. 587, 588-89 (D.D.C.1992); Trout v. Garrett, 780 F. Supp. 1396, 1400-02 (D.D.C. 1991); Trout v. Lehman, 702 F.2d 1056, 1057-58 (D.C. Cir. 1983).

In the course of this litigation, the issue of prejudgment interest on attorneys' fees and costs and on back pay was addressed by Judge Harold Greene at least twice. On July 22, 1998, Judge Greene issued a memorandum opinion and order granting plaintiffs' motion for prejudgment interest on attorneys' fees and costs, ordering that the interest be calculated using the prime rate of interest. See Trout v. Dalton, Civil Action No. 73-55, slip op. at 5 (D.D.C. July 22, 1998). On August 12, 1998, Judge Greene issued an order granting plaintiff's motion for prejudgment interest on back pay, again ordering that the interest should be calculated at the prime rate. See Trout v. Dalton, Civil Action No. 73-55 (D.D.C. Aug. 12, 1998) (order granting prejudgment interest). On March 3, 1999, the parties entered into a stipulation characterizing the July 22, 1998 order and the August 12, 1998 order as directing defendants to pay pre-November 21, 1991 interest at the prime rate of interest with respect to back pay and attorneys' fees and costs. See Trout v. Dalton, Civil Action No. 73-55 (D.D.C. March 3, 1999) (stipulation and order granting plaintiffs' recovery of accountant's fees).

The parties have agreed on the methodology to be used to calculate the amount of prejudgment interest but do not agree on what interest rate should be used. Plaintiffs argue that in most cases the prime rate is used to calculate prejudgment interest and that rate should be used here. Defendants argue that the prime rate is not appropriate in all circumstances and that in this case,

because defendants are government entities, the Treasury Bill rate should be used.

II. DISCUSSION

The determination of the appropriate interest rate on prejudgment attorneys' fees and back pay is a decision left to the discretion of the district court. See Berger v. Iron Workers Reinforced Rodmen, Local 201, 170 F.3d 1111, 1139 (D.C. Cir. 1999); Forman v. Korean Air Lines, 84 F.3d 446, 450 (D.C. Cir. 1996). While this decision is a discretionary one, courts have held that the prime rate is usually the most appropriate rate of interest. See Forman v. Korean Air Lines, 84 F. 3d at 450; Chadwick v. District of Columbia, 56 F. Supp.2d 69, 73 n.2 (D.D.C. 1999). Judge Greene, having presided over this case for many years, determined that the prime rate was appropriate in calculating plaintiffs' prejudgment interest on attorneys' fees and costs and on back pay and ordered defendants to make these payments in two rulings issued on July 22, 1998 and August 12, 1998, respectively. Judge Greene made clear that the prime rate was the interest rate to be used in making the calculations, and the Court does not see why it should revisit this already decided issue. Even, if the Court were inclined to reconsider the issue, Judge Greene's decisions are entitled to considerable deference based on his many years of handling this case and his greater familiarity with the facts and history of this litigation.

The Stipulation and Order of March 3, 1999 provides an additional reason why the Court should not revisit this issue. Although the order concerned a matter unrelated to the issue now before the Court, the parties agreed to language that characterized the rulings on July 22, 1998 and August 12, 1998 as ordering payment of prejudgment interest calculated at the prime rate. Thus,

it appears that at that time plaintiffs and defendants understood Judge Greene's rulings to have settled the issue of what interest rate should be used to calculate defendants' payments to plaintiffs.

Defendants argue that because plaintiffs seek recovery against a governmental defendant, the Treasury Bill rate is the appropriate rate of interest. The defendants urge the Court to follow the analysis set forth by Judge James Robertson in Hartman v. Duffey, 8 F. Supp.2d 1, 3 (D.D.C. 1998), in which prejudgment interest was awarded at the Treasury Bill rate against a federal agency. Judge Robertson concluded that the Treasury Bill rate was more appropriate because it reflected the interest rate defendant had available to it for short-term loans. See id. Although Judge Robertson ordered that prejudgment interest be paid at the Treasury Bill rate, he acknowledged that this decision was a discretionary one and that the appropriate interest rate could be determined by looking not only at the interest rate the defendant has available to it but also at the interest rate a plaintiff would have to pay when burrowing money. See id. at 3, quoting Forman v. Korean Air Lines, 84 F.3d at 450; see also Cement Division, National Gypsum Co. v. Milwaukee, 144 1111, 1114 (7th Cir. 1994) (holding that prime rate was more appropriate than municipal bond rate because plaintiff was involuntary creditor).

Hartman does not require that interest must be awarded at the Treasury Bill rate whenever the defendant is a governmental entity. While Judge Robertson's decision may have been appropriate in Hartman, those facts are not the ones before this Court. This Court has Judge's Greene's two previous decisions determining that the prime rate should be used to calculate prejudgment interest, as well as evidence that the parties understood that this issue had already been resolved by these

decisions. It also has developed a fair understanding of the entire history of this litigation which persuades the Court to exercise its acknowledged discretion to use the prime rate in calculating prejudgment interest.

Both Judge Greene and the court of appeals criticized the Navy's pattern of delay and abusive litigation tactics in this case. See Trout v. Lehman, 702 F.2d at 1106-07; Trout v. O'Keefe, 144 F.R.D. at 588. In these circumstances, prejudgment interest awarded at the prime rate is appropriate because it best represents the time-value of the money that plaintiffs should have received but did not receive because of defendants' delay. "[C]apital employed in the business of lawyering is like capital employed anywhere else it carries a cost. And in economic terms that cost is the price of borrowed capital." See Alberti v. Klevenhagen, 896 F.2d 927, 938 (5th Cir. 1990) (quoting Lippo v. Mobil Oil Corp., 692 F. Supp. 826, 840 (ND. Ill. 1986). Upon consideration of all of the circumstances and in the exercise of its substantial discretion, the Court will award prejudgment interest for back pay and for attorneys' fees and costs at the prime rate. Accordingly, it is hereby

ORDERED that plaintiffs' motion for prejudgment interest on back pay and attorneys' fees and costs is GRANTED; it is

FURTHER ORDERED that the amount of prejudgment interest shall be determined by using the prime rate of interest; it is

FURTHER ORDERED that using the agreed upon methodology, the parties shall calculate the amount of prejudgment interest defendants owe plaintiffs on back pay and attorneys' fees and costs at the prime rate of

interest, and within thirty (30) days of the date of this memorandum opinion and order, defendants shall present a stipulation or order to the Court directing defendants' to pay plaintiffs the full amount owed to plaintiffs; and it is

FURTHER ORDERED that all other pending motions not resolved by this order, or the order issued this same day granting in part and denying in part plaintiffs' motion for attorneys' fees issued are DENIED as moot.

SO ORDERED

PAUL L. FRIEDMAN
United States District Judge

DATE:5/31/01

Civil Action No. 73-0055 (PLF)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

YVONNE TROUT, et al.,
Plaintiffs,

v.

Gordon R. England, SECRETARY OF THE NAVY, et al.
Defendants.

Filed July 17, 2001

FINAL JUDGMENT

In accordance with the Court's Memorandum Opinion and Order of May 31, 2001, the Court hereby enters Final Judgment in favor of Plaintiffs.

The Court further orders Defendants to pay interest on back pay to Plaintiff class members of $8,627,276.40, for such interest due through July 31, 2001.

The Court further orders Defendants to pay interest on attorneys' fees of $1,477,020.90 for such interest due through July 31, 2001.

PAUL L. FRIEDMAN
UNITED STATES DISTRICT JUDGE

Date: 7/17/01

(2)

Supreme Court, U.S.
FILED
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OFFICE OF

No. 03-22

In the Supreme Court of the United States

YVONNE G. TROUT, ET AL., PETITIONERS

v.

HANSFORD T. JOHNSON, ACTING SECRETARY OF THE NAVY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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RECAP

QUESTION PRESENTED

Whether Section 114(2) of the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, which authorizes awards of prejudgment interest against the United States in employment discrimination cases, waives sovereign immunity to permit an award of accrued interest on attorneys' fees and backpay for a period before the effective date of that provision.

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In the Supreme Court of the United States

No. 03-22

YVONNE G. TROUT, ET AL., PETITIONERS

v.

HANSFORD T. JOHNSON, ACTING SECRETARY OF THE NAVY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 317 F.3d 286. The opinion of the district court awarding prejudgment interest (Pet. App. 16a-20a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 31, 2003. Petitions for rehearing were denied on March 28, 2003 (Pet. App. 14a, 15a). The petition for a writ of certiorari was filed on June 26, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1986, this Court held that Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, then did not waive the federal government's traditional sovereign immunity from awards of interest. *Library of Congress* v. *Shaw*, 478 U.S. 310, 323 (1986). In 1991, Congress enacted Section 114(2) of the Civil Rights Act of 1991 (1991 Act), Pub. L. No. 102-166, 105 Stat. 1071, which amended Title VII to allow for awards of "the same interest to compensate for delay in payment" in employment discrimination suits brought against the federal government as is available "in cases involving nonpublic parties." 42 U.S.C. 2000e-16(d). Section 114(2) became effective on November 21, 1991. Pet. App. 6a.

2. Petitioners in this case are female civilian employees of the United States Navy who sued the Navy in 1973 in the United States District Court for the District of Columbia, alleging that they had been discriminated against on the basis of sex, in violation of Title VII. Pet. App. 2a. The individual suits were consolidated and the case was certified as a class action. *Id.* at 2a-3a. In 1981, the district court found the Navy liable for violating Title VII and awarded class members backpay. *Id.* at 3a. Following an appeal, this Court granted the government's petition for a writ of certiorari, vacated the court of appeals' decision, and remanded the case for new findings of fact. *Lehman* v. *Trout*, 465 U.S. 1056 (1984). In 1986, the district court, on remand, reinstated its earlier finding of liability. Pet. App. 3a.

In 1988, the district court granted class members an interim attorneys' fee award of $276,044 and $15,434 in costs. Pet. App. 3a. Later in 1988 and in 1989, the

district court determined that the class members are entitled to backpay relief and directed a special master to determine the most appropriate statistical methodology for establishing the amount of backpay owed to each claimant. *Id.* at 3a-4a. In 1990, the special master made recommendations. *Id.* at 4a.

On November 27, 1991, six days after Section 114(2) of the 1991 Act became effective, the district court granted class members an interim backpay award of $670,402 for the period from June 1970 through April 1979. Pet. App. 4a. In November 1992, citing "'inappropriate' delay tactics" on the part of the Navy, the court extended the period covered by the backpay award "to the present." *Ibid.*

In September 1993, the parties entered into a settlement agreement under which eligible class members were entitled to backpay through December 1991 and attorneys' fees through mid-May 1993. Pet. App. 5a. The class members reserved the right to seek interest on the backpay and attorneys' fees under Section 114(2) of the 1991 Act. For its part, the government reserved its position that Section 114(2) is not retroactive and, therefore, interest accrued on backpay and attorneys' fees only after Section 114(2)'s effective date of November 21, 1991. *Ibid.*

3. In July 1998, the district court agreed with the class members' view of Section 114(2)'s correct application, and held that petitioners are entitled to prejudgment interest accrued on the award of backpay and attorneys' fees before Section 114(2)'s effective date. Pet. App. 16a-20a. The court distinguished *Brown* v. *Secretary of the Army*, 78 F.3d 645 (D.C. Cir. 1996), in which the court of appeals had held that Section 114(2) is not retroactive. The court stated that *Brown* should be "[l]imited to its facts," which involved a case in

which litigation of the merits of the underlying action was complete before November 21, 1991. *Id.* at 17a. This case, the court said, "was very much alive and being actively litigated on that date." *Id.* at 17a-18a. The district court acknowledged that the "liability phase" of this case ended in April 1990, but it stated that "the award phase of the litigation was ongoing and picking up steam when § 114(2) became effective." *Id.* at 20a n.2. The district court later ordered the Navy to pay prejudgment interest, through July 31, 2001, of $8.6 million on the backpay award and $1.4 million on the attorneys' fee award. *Id.* at 30a.

4. The court of appeals reversed and remanded. Pet. App. 1a-13a. It concluded in pertinent part that the district court erred "by focusing on the procedural posture of [the instant] litigation rather than the conduct underlying the litigation." *Id.* at 8a. The court of appeals noted that *Brown* answered in the negative the question "whether § 114(2) applies retroactively 'to a case arising from conduct that occurred before it was enacted.'" *Id.* at 9a (quoting *Brown*, 78 F.3d at 648). The court also emphasized that its unwillingness in *Brown* to "'impose upon the United States a liability to which it had not explicitly consented,' 78 F.3d at 654, was in keeping with [this Court's instruction in *Landgraf* v. *USI Film Products*, 511 U.S. 244 (1994),] not to 'impose[] new burdens on persons after the fact.' 511 U.S. at 270." Pet. App. 10a.

Finally, the court of appeals concluded that this Court's decisions in *INS* v. *St. Cyr*, 533 U.S. 289 (2001), and *Martin* v. *Hadix*, 527 U.S. 343 (1999), "remove any doubt that the conduct underlying the complaint, rather than the procedural posture of the litigation, has significance in this context." Pet. App. 10a. Those decisions, the court of appeals explained, emphasize

that retroactivity analysis turns in significant part on "considerations of fairness" to parties who "should have an opportunity to know what the law is and to conform their conduct accordingly." *Id.* at 10a-11a (quoting *St. Cyr*, 533 U.S. at 316, and citing *Martin*, 527 U.S. at 360-361).

Accordingly, the court of appeals held that the district court erred in awarding prejudgment interest under Section 114(2) for periods prior to the November 21, 1991, effective date of Section 114(2). Pet. App. 12a-13a.

On March 28, 2003, the court of appeals denied petitioners' petitions for rehearing. No judge voted in favor of panel rehearing or requested a vote on rehearing en banc. Pet. App. 14a, 15a.

ARGUMENT

Petitioners argue that Section 114(2) of the Civil Rights Act of 1991 (Pub. L. No. 120-166, 105 Stat. 1071) expressly waives the sovereign immunity of the United States with respect to an award of prejudgment interest on backpay and attorneys' fees in a case that was pending in the district court on the effective date of Section 114(2), for periods before that effective date. The court of appeals correctly rejected petitioners' argument. Its decision does not conflict with any decision of this Court or any other court of appeals and raises no issue of substantial prospective importance. Review by this Court therefore is not warranted.

1. Petitioners attempt to identify "differences in [the] approaches" (Pet. 11) that the circuits have taken when determining, in various contexts, whether waivers of the federal government's sovereign immunity are retroactive. See Pet. 19-28. Yet every other circuit to address the retroactivity *vel non* of Section 114(2) has

concluded, in agreement with the D.C. Circuit in *Brown* v. *Secretary of the Army*, 78 F.3d 645 (1996), and the instant case, that Section 114(2) is not retroactive and prejudgment interest is not available for periods before November 21, 1991. See *Arneson* v. *Callahan*, 128 F.3d 1243, 1246 (8th Cir. 1997) ("[T]he 1991 amendment does not apply retroactively."), cert. denied, 524 U.S. 926 (1998); *Woolf* v. *Bowles*, 57 F.3d 407, 410 (4th Cir. 1995) ("[S]ection 114 does not apply retroactively."); *Huey* v. *Sullivan*, 971 F.2d 1362, 1365-1366 (8th Cir. 1992), cert. denied, 511 U.S. 1068 (1994); see also *Edwards* v. *Lujan*, 40 F.3d 1152, 1154 n.1 (10th Cir. 1994) (stating in dictum that this Court's cases "support[] a presumption against retroactive application of § 114"), cert. denied, 516 U.S. 963 (1995).

Those uniform decisions of other circuits cannot be distinguished on the basis that this case "was pending [in the district court] on the merits on November 21, 1991." Pet. 10. That assertion is factually questionable. See pp. 2-3, *supra* (discussing case history). More fundamentally, there is no question after this Court's decision in *Landgraf* v. *USI Film Products*, 511 U.S. 244 (1994), that a provision that increases liability is retroactive if it is applied to underlying conduct that pre-dated the 1991 Act's passage. See *id.* at 265-280.

In any event, the importance of the question presented in this case is inherently limited and diminishing over time. It has been nearly a decade since this Court heard argument in *Landgraf* about the retroactivity of the 1991 Act. While a decade ago there were numerous pending cases addressing pre-1991 conduct, the number of such cases has necessarily diminished. Morever, Section 114(2) applies only to employment-discrimination suits against the federal government. See 42 U.S.C. 2000e-16(a). The question of how Section 114(2)

should be applied to the subset of government employment-discrimination suits that were pending in a district court on November 21, 1991, is unlikely to arise with any frequency in the future. The question arises at the present time only because the instant case has been "extremely protracted" (Pet. App. 2a). Whether or not Section 114(2) is retroactive has no significance in any case filed after November 1991—that is, within the last 12 years.

2. The decision below is correct. As the court of appeals explained, "[s]tatutes waiving the sovereign immunity of the United States are subject to the rule of strict construction." Pet. App. 6a (citing *Library of Congress* v. *Shaw*, 478 U.S. 310, 318 (1986); *Ruckelshaus* v. *Sierra Club*, 463 U.S. 680, 685 (1983)). The court of appeals also correctly noted that, as stated in *Shaw*, "the historical 'no-interest rule' bars recovery of interest against the government 'unless the award of interest was affirmatively and separately contemplated by Congress.'" *Id.* at 7a (quoting *Shaw*, 478 U.S. at 315, 318-319). Consistent with those principles, the court of appeals concluded in this case that the "rule of strict construction, enhanced by the no-interest rule, applies whether the court is examining a statute's substantive scope or its temporal reach." *Ibid.*

The court of appeals also correctly applied "the traditional presumption * * * against applying statutes affecting substantive rights, liabilities, or duties to conduct arising before their enactment." Pet. App. 10a (quoting *Landgraf*, 511 U.S. at 278). Because there is no evidence (much less clear evidence) of a congressional intent that Section 114(2) of the 1991 Act should apply before its effective date, see *id.* at 12a; *Brown*, 78 F.3d at 648, the court of appeals determined that prejudgment interest may not be awarded against

the United States for any period before November 21, 1991. Pet. App. 12a-13a.

3. Finally, there is no force to petitioners' invocation (Pet. 28) of Congress's general "statutory goals of * * * ending discrimination in employment by the federal government and providing full relief." As the Court noted in *Landgraf*, such policy arguments for retroactive application of remedial provisions "[are] not sufficient to rebut the presumption against retroactivity." 511 U.S. at 286.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 2003

(3)

Supreme Court, U.S.
FILED
OCT 9 _ 2003
OFFICE OF THE CLERK

No. 03-22

In the

Supreme Court of the United States

YVONNE G. TROUT, individually and on behalf of others similarly situated and CLARA A. PERLIGIERO,

Petitioners,

v.

SECRETARY OF THE NAVY AND COMMANDING OFFICER, NAVAL COMMAND SYSTEMS SUPPORT ACTIVITY,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the D.C. Circuit

PETITION FOR A WRIT OF CERTIORARI

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PETITIONERS' REPLY TO OPPOSITION BRIEF OF RESPONDENTS

Respondents do not address petitioners' central argument, that the application of Section 114(2) of the 1991 Act to *Trout* involves a "prospective" application of the statute. The Court should accept the petition because this issue raises "***a recurring question in the law***: When should a new federal statute be applied to pending cases?" *Martin v. Hadix*, 527 U.S. 343, 352 (1999) (citations omitted) (emphasis added).

On September 30, 2003, the Court granted the Petition for Certiorari in *Republic of Austria v. Altmann*, No. 03-13. The Petition granted was limited to Question One, which involves the issue of whether the Ninth Circuit's holding that the application of the Foreign Sovereign Immunities Act to conduct occurring prior to the effective date of the statue is "prospective," rather than impermissibly "retroactive." *Altmann v. Republic of Austria*, 317 F. 3d 954, 964-965 (9th Cir. 2003). *See* Petition for *Certiorari* at 6-7, 9-10.

The Court of Appeals erred in reversing the District Court's award of interest on back pay awards to sixty-seven prevailing plaintiffs for "delay in payment" pursuant to the express waiver of sovereign immunity contained in Section 114(2) of the Civil Rights Act of 1991. On the effective date of Section 114(2) the *Trout* case was being fully litigated on the merits before the District Court.[1] Final judgment on liability was on

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[1]Respondents characterize petitioners' claim that *Trout* "was pending [in the district court] on the merits on November 21, 1991 as factually questionable." Opposition at 6. Since the liability phase of the litigation is not complete during the remedial state of a class action, and no final judgment was entered until the approval of the class action settlement, this assertion is incorrect. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 266 (1989) (O'Connor, J.,

November 22, 1993, two years after Section 114(2) became law.

I.

Respondents claim in conclusory fashion that the decision of the Court of Appeals denying full and adequate relief to the sixty-seven claimants does not conflict with any decision of this or other courts. Opposition at 5. Respondents also argue that the issue before the Court involves a narrow sub-set of civil rights cases that were pending on November 21, 1991, and that the issue of retroactive application of congressionally enacted waivers of sovereign immunity raised in *Trout* is "unlikely to arise with any frequency in the future." Opposition at 7. We disagree because the determination of whether a statute operates "prospectively" or "retroactively" is a recurring issue, as evidenced by the grant of review in *Altmann*, *supra*.

Respondents' unsupported assertion is entitled to no intellectual weight in view of the failure to discuss the majority of the cases discussed in the Petition for *Certiorari*. Respondents' decision not to even mention this Court's decisions in *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 839 (1990), and *Lindh v. Murphy*, 521 U.S. 320, 326 (1997), or the Federal Circuit's decision in *Travenol Laboratories, Inc. v. United States*, 118 F.3d 749, 751, 753, *reh'g denied* (Fed. Cir. 1997), should be read as an admission that these cases are fatal to respondents' position.

II.

In *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), this Court sought to reconcile two seemingly conflicting retroactivity principles. The *Landgraf* Court

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concurring). A case is pending until the court enters final judgment. *See Trout v. Garrett*, 891 F.2d 332, 335 (D.C. Cir. 1989) (Ginsburg, R.B. J.) (citation omitted)

specifically reaffirmed the continuing vitality of the holding in *Bradley v. School Bd. of Richmond*, 416 U.S. 696, 711 (1974), "that a court is to apply the law in effect ***at the time it renders its decision***, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." *Id.* at 277, quoting *Bradley*, at 711 (emphasis added). "When the intervening statute authorizes or affects the propriety of prospective relief, application of the new provision is ***not*** retroactive." *Id.* at 273. (Emphasis added.)

The mere fact that the new legislation requires reference to antecedent events or data, however, does not make its application retroactive. *Id.* at 269. The test for determining whether a statute operates "retrospectively" or "retroactively" is not at issue where the triggering event is not "completed" at the time "the court renders a decision." *Id.* at 269-270. This Court observed that: "A statute does not operate 'retrospectively' merely because it is applied in a case arising from conduct antedating the statute's enactment, or upsets expectations based in prior law." *Id.* at 269 (footnote omitted)

Rather, the Court "must ask whether the new provision attaches new legal consequences to events completed before its enactment." *Id.* "The conclusion that a particular rule operates 'retroactively' comes at the end of a process of judgment concerning the nature and extent of the change in the law and the degree of connection between the operation of the new rule and a relevant past event." *Id.* at 269-70 (footnote omitted).

Whether an application of law dealing with the award of interest is "prospective" or "retroactive" "depends upon what one considers to be the determinative event by which retroactivity or prospectivity is to be calculated." *Kaiser Aluminum*,

supra, at 857 n. 3 (Scalia, J. concurring). A change in statute is not "retroactive," but is a "prospective" application as long as the event that triggers the application of the law occurs after enactment. *Id.* Under *Kaiser Aluminum*, the triggering or determinative event for the purposes of determining eligibility for prejudgment interest is the entry of judgment. Judgment is the final reckoning which determines whether there is liability and defines the basis upon which interest is due. *Id.* at 839. Judgment is the point at which "expectations with respect to interest liability were fixed." *Id.*

When *Landgraf* is read in light of the teachings of *Kaiser Aluminum* it is clear that the application of Section 114(2) of the Civil Rights Act of 1991 to the award of interest on judgments entered after the passage of the 1991 Act does not raise *bona fide* issues of retroactivity, because the triggering event, the entry of judgment in *Trout*, did not occur until after the effective date of the 1991 Act. *Kaiser Aluminum*, *supra*, at 827 (interest rate for judgment determined on the date of judgment). Thus, petitioners seek the "prospective" application of the statute as this term was defined by this Court in *Kaiser Aluminum* and *Landgraf*.[2]

By failing to follow *Landgraf* and *Kaiser Aluminum*, the court below erred in concluding that the triggering event was the conclusion of the liability phase of trial, rather than the entry of judgment. *Trout v. Secretary of the Navy*, 317 F.3d 286, 292 (D.C. Cir. 2003); App. 8a. Since the entry of judgment is the triggering event which determines whether a statute is retroactive, the application of Section 114(2) to the *Trout* litigation

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[2]*Landgraf's* multiple citations to *Kaiser Aluminum* leave no doubt of the continuing vitality of *Kaiser Aluminum*.

does not require a "retroactive" application of the statute, but a "prospective" application of that provision.

The issues raised in the Petition are far broader than the application of Section 114(2) of the Civil Rights Act of 1991 to a case pending on the merits in the District Court when the 1991 Act was passed. Rather, petitioners raised the question of the rules for determining whether new legislation applies to a pending case, *viz.*, whether the application of a statute to a pending case is "retroactive," rather than "prospective." As the Court noted, this is a "recurring question in the law." *Martin v. Hadix*, 527 U.S. at 352. We submit that this question of what events trigger the application of a statute to a pending case can not be answered without reference to *Kaiser Aluminum*, which was not cited by respondents or by the District of Columbia Circuit Court of Appeals.

III.

The Federal Circuit interpreted *Landgraf* and *Kaiser Aluminum* to hold that where the event triggering the application of the amended statute occurs after the passage of the amendment, the application of the statute is not "retroactive." *Travenol*, *supra*, at 754. In *Travenol*, the Federal Circuit ruled that the federal government was required to pay interest for periods prior to the passage of the Act, where the event triggering the application of the new statute occurs after the effective date of the statute. The Federal Circuit concluded that the change in the law relating to the award of interest against the federal government "***does not attach new legal consequences to any events that occur before liquidation because, being preliminary in nature, those events do not give rise to interest liability***." *Id.* at 753, n. 5 (emphasis added).

In *Travenol*, the Federal Circuit held that payment of interest ***by the federal government*** on sums deposited prior to the waiver of sovereign immunity was a "prospective" application of the law. In *Travenol*, the court held where the triggering event occurred after the date of enactment of the statute allowing payment of interest on funds deposited with the federal government prior to the passage of the statute allowing interest, this was not "retroactive" application of the statute. *Id.* at 751, 753.

The analysis of the D.C. Circuit in *Trout*, which relies on its "special rule" of statutory construction is directly contrary to that of the Federal Circuit. The Court should grant review to resolve the conflict as to when the application of a statute to pending matters is "prospective" and whether the District of Columbia Circuit erroneously resolved this issue by failing to consider the teachings of *Kaiser Aluminum*.

IV.

There is no dispute that rules of strict construction apply to the analysis of whether there is a waiver of sovereign immunity. Respondents concede, and the D.C. Circuit agreed, that Section 114(2) expressly waived the sovereign immunity of the United States. App. 22a-23a; *Trout*, 317 F.3d at 291, App. 8a. However, the D.C. Circuit failed to give full effect to congressional intent to waive the government's immunity from interest.

"In determining whether a statute's terms would produce a retroactive effect, however, and in determining a statute's temporal reach generally, our normal rules of construction apply." *Lindh v. Murphy*, *supra*, at 326. Waivers of sovereign immunity are to be construed by the ordinary tools of statutory construction. *Block v. Neal*, 460 U.S. 289, 298 (1982) ("The exemption of the sovereign from suit involves

hardship enough where consent has been withheld. We are not to add to its rigor by refinement of construction where consent has been announced.") (Citations omitted.)

Under the ordinary rules of statutory construction, the plain language of the statute governs. That Congress intended to fully compensate the victims of unlawful discrimination is clear. Section 114(2) of the Civil Rights Act was passed to expressly overrule this Court's decision in *Library of Congress v. Shaw*, 478 U.S. 310, 318 (1986). *Landgraf, supra*, at 251. Since no interest can accrue against the United States [or any party] until judgment is entered and the judgment at issue here was entered two years after enactment of the Civil Rights Act of 1991, the plain meaning of Section 114(2) allows the payment of pre-1991 prejudgment interest on judgments entered in November 1993.

In the present case, the judgment giving rise to delay in payment was not entered before the 1991 Act was enacted and therefore the litigation was not "completed" until after the 1991 Act was passed. There can be no prejudgment interest in the absence of a judgment and there was no final determination that any back pay [and therefore any interest] was due prior to November 22, 1993. Only "on the date of judgment," *viz.*, November 22, 1993, were "expectations with respect to interest liability . . . fixed." *See Kaiser Aluminum, supra*, at 839 (refusing to apply amended post-judgment interest statute because right to interest became fixed at the date of entry of judgment). Because the "same interest " provision of the Civil Rights Act of 1991 can only logically apply to cases where judgment on the merits has not been entered prior to enactment, the "prospective" application of the statute is necessary to pay the full amount of interest on ***post***-Act judgments

in order to adhere to the congressional mandate contained in Section 114(2) of the 1991 Act.

V.

Instead of applying the "normal rules" of statutory construction in analyzing the plain language of the acknowledged waiver of sovereign immunity contained in Section 114(2), the D.C. Circuit applied its own "special rule," first articulated in *Brown v. Secretary of Army*, 78 F.3d 645, *reh'g denied*, 86 F.3d 225 (D.C. Cir.), *cert. denied*, 519 U.S. 1040 (1996), for interpreting statutes containing waivers of sovereign immunity.[3] The District of Columbia's rule of decision created in *Brown* and applied in *Trout* imposed "an added gloss of strictness" on the usual rules governing analysis of waivers of sovereign immunity. Under the rulings of this Court, there is no basis for the "added gloss of strictness" or the "special rule" for analyzing express waivers of sovereign immunity. *Bowen v. City of New York*, 476 U.S. 467, 479 (1986) (citations omitted.); *Franconia Associates v. United States*, 536 U.S. 129, 145 (2002) (citations omitted). The rule of strict construction applies only when there is ambiguity in the waiver of sovereign immunity. *See, e.g., Shaw, supra*, at 318; *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 685 (1983). There is no such ambiguity present here.

The statutory interpretation of the scope of waivers of sovereign immunity is potentially raised each

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[3]Respondents' heavy reliance on *Brown* is misplaced because that case was no longer pending on the merits when the Civil Rights Act of 1991 became law. As the *Brown* panel observed "litigation on the merits of Brown's claim was ***completed*** and the attorney's fee incurred before the statute became effective." *Id.* at 654 (emphasis added). Mr. Brown obtained a final District Court Judgment "on the merits" in 1989 and this judgment was affirmed "on the merits" by the Court of Appeals in 1990.

and every time Congress consents to suit by legislation. This Court should provide guidance to the lower courts as to whether an acknowledged waiver of sovereign immunity of the United States is to be analyzed under principles articulated in *Kaiser Aluminum* and *Landgraf* or whether the D.C. Circuit's "special rule" for interpreting waivers of sovereign immunity applies. As the D.C. Circuit itself recognized "there remains considerable confusion about the relationship between that ***special rule*** and the principles governing the retroactivity of statutes in general." *Brown*, *supra*, at 654 (emphasis added) (citations omitted) In light of this "considerable confusion," the Court should grant review.

VI.

Respondents concede that Section 114(2) applies to *Trout*, App. at 22a-23a, but claim that the waiver is only a partial waiver of sovereign immunity. There is no authority to support this novel "partial waiver" theory, which defies the clearly expressed will of Congress and the plain language of the statute. The partial waiver of sovereign immunity created by the Court of Appeals below does not appear in the statutory text and, unless the text of the statute is ambiguous, its language is controlling. *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). There is no ambiguity in the text which would support the conclusion that the language of Section 114(2) contains only a partial waiver of sovereign immunity.

It is indeed ironic that the Court of Appeals felt constrained to interpret an unambiguous, express waiver of sovereign immunity, which concededly applies to the *Trout* litigation, in a manner which denied full relief to sixty-seven victims of unlawful sex discrimination in order to protect the government fisc, where the delay in payment was caused by respondents'

"bad faith" litigation tactics. Petition at 3-5. The Court should grant the petition to correct the D.C. Circuit's erroneous conclusion that there could be a partial waiver of sovereign immunity.

CONCLUSION

The Petition for a Writ of Certiorari should be granted to resolve a legal issue of importance regarding the identification of the triggering event which determines whether the application of a statute is "prospective" and to resolve the conflict between the D.C. Circuit's decision below and that of the Federal Circuit in *Travenol* as to whether the entry of Judgment is the triggering event for determining when the application of a statutory amendment to pending cases is "prospective."

The Petition should also be granted to answer the fundamental questions of whether the D.C. Circuit's "special rule" of second-level strict statutory analysis is required to analyze unambiguous congressional waivers of sovereign immunity.

Respectfully submitted,

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